

GCDTPIC1

Trial

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 MICHAEL PICARELLA,

4 Plaintiff,

5 v.

14 CV 4463 (ALC)

6 HSBC (USA) SECURITIES, INC.,

7 Defendant.

8 -----x

New York, N.Y.  
December 13, 2016  
9:10 a.m.

10 Before:

11 HON. ANDREW L. CARTER,

12 District Judge

13 APPEARANCES

14 LIDDLE & ROBINSON LLP  
15 Attorneys for Plaintiff

16 BY: JAMES R. HUBBARD  
17 BLAINE H. BORTNICK  
CHRISTINE PALMIERI

18 BOIES, SCHILLER & FLEXNER LLP  
19 Attorneys for Defendant

20 BY: RANDALL W. JACKSON  
21 DAVID L. SIMONS  
22 NICHOLAS STANDISH

23 GIBSON, DUNN & CRUTCHER LLP  
24 Attorneys for Defendant

25 BY: GABRIELLE F. LEVIN

GCDTPIC1

Trial

1 (Jury not present)

2 THE COURT: So we're here for the charge conference.

3 I have reviewed the parties' written objections to the jury  
4 charge and -- the draft jury charge and the draft verdict form.  
5 First let me just make sure we're all on the same page. My  
6 understanding is the plaintiffs wish to withdraw the New York  
7 State claim, is that correct?

8 MR. HUBBARD: Yes, your Honor.

9 THE COURT: All right. And I assume the defendants  
10 don't object to that.

11 MS. LEVIN: Your Honor, we have no objection. We do  
12 ask that the Court issue an order memorializing the withdrawal  
13 of that claim.

14 THE COURT: It seems that moots a lot of the  
15 defendant's objections to the jury charge and the verdict form;  
16 not all of them, but it moots many of them. But let's move on  
17 to objections. Let's go bit by bit here.

18 The plaintiff's objection to the verdict form question  
19 13: Has the defendant proved by preponderance of the evidence  
20 that the defendant would have taken an adverse employment  
21 action against plaintiff for non-retaliatory reasons alone?

22 I want to make sure that I fully understand the  
23 plaintiff's objection. The plaintiff's objection seems to be  
24 as if -- let me make sure I fully understand what the  
25 plaintiff's objection is, because in that statement, the way it

GCDTPIC1

Trial

1 is written, clearly the burden is on the defendant, that's the  
2 defendant's burden to prove that by a preponderance of the  
3 evidence. I want to make sure I understand fully what the  
4 plaintiff's objection is.

5 MR. HUBBARD: Your Honor, may I ask your permission,  
6 Mr. Bortnick is going to handle -- and Ms. Palmieri will handle  
7 the charge conference, may I be excused for this portion?

8 THE COURT: Yes.

9 MR. BORTNICK: Your Honor, yes, it's the defendant's  
10 burden of proof. That's not the issue here for the plaintiff.  
11 The issue is that if the -- under the law, as we understand it,  
12 if there was an impermissible retaliatory animus, for lack of a  
13 better word right now, that HSBC had when they decided to  
14 terminate him, Mr. Picarella, even if they would have  
15 terminated him or taken any other adverse employment action  
16 against him solely on non-retaliatory grounds, under the New  
17 York City statute that still is impermissible retaliatory  
18 animus.

19 THE COURT: Back up again. Repeat that last part  
20 again. I want to make sure I'm fully understanding.

21 MR. BORTNICK: Maybe I can try it a different way.

22 THE COURT: If what you're saying is under the New  
23 York City human rights law, if the retaliatory animus played a  
24 part in the adverse employment action, then plaintiff wins, is  
25 that your point?

GCDTPIC1

Trial

1 MR. BORTNICK: I'm saying that, and even if they had  
2 still taken the same actions because they're saying 90 percent  
3 with a permissible motive, under the New York City statute,  
4 that's not permissible.

5 And question 13, the way I read it, at least, and the  
6 way we read it, is that it's essentially suggesting or telling  
7 the jury that if the defendant had taken an adverse employment  
8 action against Mr. Picarella and 90 percent of their thought  
9 process was for permissible reasons, then that would be okay,  
10 and that is what we object to.

11 THE COURT: But what is your take on the adverb  
12 "alone" there at the end of that, "alone?"

13 MR. BORTNICK: That's where I'm -- "alone," I can see  
14 it read one of two ways, but the way I'm reading it is that  
15 if -- you could read it either way. When I first read this  
16 instruction I read it as if they would have just for all the  
17 90 percent reasons, that alone is enough. In other words, our  
18 non-retaliatory reasons alone are enough to fire him or take an  
19 adverse employment action, then there's no retaliation under  
20 the law. That's how I read it. Sort of like alone or enough,  
21 rather I think we should not even have such an instruction, and  
22 it should really be based on question 12.

23 And there are -- there's an additional modification I  
24 would propose, because I know that the defendants objected in  
25 part, and I do think that that should be addressed because I do

GCDTPIC1

Trial

1 think they have a point on that issue. But on 13, it seems to  
2 me to indicate to the jury that if it's alone enough for  
3 non-retaliatory reasons, then Mr. Picarella cannot prevail, and  
4 that's not a correct statement of the law.

5 The seminal case here, the one that controls here is  
6 the First Department case, the Williams case that we cited, and  
7 the Williams case I think is very clear here.

8 THE COURT: There doesn't seem to be in any  
9 disagreement about the law, it seems that you have a  
10 disagreement about the wording of that instruction.

11 MR. BORTNICK: Yes.

12 THE COURT: And you feel the instruction is  
13 superfluous, I suppose, is your position.

14 MR. BORTNICK: Yes on number 13, yes.

15 THE COURT: What's defendant's position on this?

16 MS. LEVIN: Your Honor, defendant's position is that  
17 the instruction is wholly appropriate. I think that  
18 plaintiff's counsel appears to be misreading or  
19 misunderstanding the import of the instruction.

20 The case law is clear that the Court is not permitted  
21 to second guess legitimate personnel decisions so long as  
22 they're based on non-retaliatory reasons, and I think the  
23 instruction memorializes that. If the defendant would have  
24 taken the same adverse action in the absence of retaliatory  
25 reasons, then defendant should prevail in this case.

GCDTPIC1

Trial

1 THE COURT: Okay. I will think about that. Let's  
2 move on to 12.

3 MR. BORTNICK: I want to point the Court to the  
4 Williams case in the headnote 3 where it talks about -- where  
5 the Williams court talks about that no challenged conduct may  
6 be deemed non-retaliatory before determination that a jury  
7 could not reasonably conclude from the evidence that such  
8 conduct was, in the words of the statute, reasonably likely to  
9 deter a person from engaging in a protected activity.

10 That's the heart of this, and that's what I don't  
11 think that question 13 -- 13 just creates a lot of confusion  
12 around it. Counsel just said well, I must be confused or I'm  
13 not reading it well. If that's the case, then I think the jury  
14 likely would have the same issue.

15 In other words, another way to say it, if the answer  
16 to question 12 is yes, the answer to 13 has to be yes. They  
17 can't be inconsistent. And that's why it's superfluous and  
18 confusing. If question 12 is yes, question 13 has to be yes,  
19 too, otherwise you have a completely contradictory response on  
20 the verdict form.

21 MS. LEVIN: I disagree, your Honor, respectfully. I  
22 think the case law is clear that once a connection has been  
23 established, the defendant then has the opportunity to  
24 articulate a non-retaliatory legitimate business reason for the  
25 decision.

GCDTPIC1

Trial

1 THE COURT: Okay, let me ask you this, if we change  
2 the language of that -- what if we change the language to 13:  
3 Has defendant proved by a preponderance of the evidence that  
4 the defendant would have only taken the adverse employment  
5 action for non-retaliatory reasons?

6 MR. BORTNICK: How about "did take," as opposed to  
7 "have only," that the defendant took the adverse employment  
8 action solely for or only for non-retaliatory reasons, as  
9 opposed to would have taken or would take. I'm just changing  
10 it to the past tense. The defendants took only for  
11 non-retaliatory reasons, I think that gets --

12 THE COURT: I think putting "took" in there may be a  
13 bit of a problem; sort of hair splitting here. Obviously the  
14 jurors are supposed to go through the verdict sheet in order.  
15 I don't want anything in the verdict sheet making this sort of  
16 affirmative statement that the defendant took materially  
17 adverse employment action.

18 But has defendant proved by the preponderance of the  
19 evidence that the defendant would have only taken the adverse  
20 employment action against plaintiff for non-retaliatory reasons  
21 alone? We can leave the "alone" in there as well so it's even  
22 more clear. Does that cure your issue?

23 MR. BORTNICK: I'm not sure that it did, but I think  
24 that would have taken -- maybe only -- maybe would have taken  
25 the adverse employment action against plaintiff solely for

GCDTPIC1

Trial

1 non-retaliatory reasons, period, maybe, and use the word  
2 "solely."

3 THE COURT: Okay. Seems fine to me.

4 Defendants have any position on that?

5 MS. LEVIN: Just to clarify, your Honor, the proposal  
6 is --

7 THE COURT: Has defendant proved by preponderance of  
8 the evidence that defendant would have taken the adverse  
9 employment action against plaintiff solely for non-retaliatory  
10 reasons?

11 MS. LEVIN: That's fine, your Honor, no objection.

12 THE COURT: We'll make that correction.

13 Let's move to 12.

14 MR. BORTNICK: 12. I'm looking at the letter here,  
15 and I think there may be a typo because there was the  
16 motivating factor language was struck, but I think probably we  
17 should have played any role in brackets, and I'm looking at  
18 that now. Yes, so there's an error in that letter that I just  
19 am noticing now.

20 But the issue is yes, the Second Department, which is  
21 not controlling here, does use the words "motivating factor,"  
22 the First Department does not. And I think the reason is  
23 motivating factor becomes confusing because motivating factor  
24 is an issue when looking at Title VII or the state claim and  
25 not the city claim. The language of Williams talks about no



GCDTPIC1

Trial

1 role. So any role is just sort of flipping that on its head,  
2 and I would have an objection to working with the word "no,"  
3 but no role is the issue under Williams, and motivating factor  
4 is not the standard under Williams, and it's too close to the  
5 Title VII.

6 THE COURT: What's defendant's position on this?

7 MS. LEVIN: Defendant's position, your Honor, is the  
8 same position that we set out in our two letters to the Court  
9 on this, that motivating factor is the correct standard. It's  
10 the standard that is consistently applied by district courts in  
11 this district, including a case from earlier this year. And so  
12 we believe that motivating factor is the correct standard,  
13 that, as plaintiff's counsel noted, there's New York State  
14 Court case authority supporting motivating factor as well, and  
15 that's the correct standard.

16 For the reasons stated in our letter, we do think that  
17 the language regarding "desire to retaliate" should be struck,  
18 because it implies that there was a desire to retaliate, and we  
19 think that the proper standard is that the protected activity  
20 was the motivating factor.

21 MR. BORTNICK: Your Honor, if I may, in the brief that  
22 defendant has submitted to the Court it does not even use  
23 motivating factor as the standard. They cite another Second  
24 Department case which they quote as the standard being the  
25 defendant was motivated, at least in part, by an impermissible

GCDTPIC1

Trial

1 motive, not motivating factor, which is -- which I think is  
2 different.

3 On this issue of desire, while I personally believe  
4 that the evidence was overwhelming that HSBC had a desire, of  
5 course I understand that could probably be better worded, and  
6 that "desire" is probably not appropriate. So I do agree and I  
7 do have a suggested way of dealing with both of those issues  
8 with suggested language.

9 THE COURT: What's the suggestion?

10 MR. BORTNICK: Has the plaintiff proved by a  
11 preponderance of the evidence that retaliation played any  
12 role -- sorry, yes, has plaintiff proved by a preponderance of  
13 the evidence that retaliation played any role in defendant's  
14 decision to take an adverse employment action against him in  
15 violation of the New York City Human Rights Law.

16 I think it deals with their issue of desire, and it  
17 deals with our issue -- plaintiff's issue of motivating factor.

18 MS. LEVIN: Your Honor, we object, respectfully. The  
19 standard is whether protected activity was the motivating  
20 factor in the adverse employment action, and we think the  
21 question should be phrased based on that language.

22 THE COURT: Okay. I will think about that.

23 MR. BORTNICK: And just one thing, your Honor. I  
24 don't know where motivating factor comes from. It's not in the  
25 Second Department case that they cite, and certainly not in

GCDTPIC1

Trial

1 Williams, and not even in a more recently decided Second  
2 Department case which talks about if the plaintiff was  
3 motivated by racial or ethnic, in this case discriminatory  
4 animus, retaliatory animus for us, even in part. But the issue  
5 is not motivating factor in any of the cases, and certainly not  
6 in the controlling authority here.

7 THE COURT: Many of the cases in our circuit, in the  
8 Second Circuit, have used that language. Again, while I  
9 understand --

10 MR. BORTNICK: I understand, but it's really a matter  
11 of the state law here, your Honor. In fact that's why the  
12 Restoration Act was passed, because there were certainly  
13 federal as well as state decisions that equated New York City  
14 Human Rights Law with Title VII, and that's why the Restoration  
15 Act was passed to say no, we have our own way of doing it in  
16 the city.

17 THE COURT: So to be clear, the debate is whether or  
18 not to use motivating factor, motivated in part, or played any  
19 role, is that what we're talking about?

20 MR. BORTNICK: Yes, or to reverse it, no role, which  
21 is the actual language of Williams, I think any role is exactly  
22 the same thing.

23 THE COURT: Okay. I will think about that.

24 Let's move on to the next objection from plaintiff.  
25 It seems to me the objection to Questions 1, 3, 9 and 11 on the

GCDTPIC1

Trial

1 verdict form, you object to those because they're not in  
2 question. If both parties agree to stipulate to certain things  
3 and take them out of the jury's consideration, fine, but it  
4 seems to me I certainly shouldn't be taking matters out of the  
5 jury's consideration. The fact that there may not be any real  
6 dispute about these issues, the jury does not have to accept  
7 the fact that the parties may not seem to have a real  
8 disagreement about that. I don't want to invade the province  
9 the jury. The jury will make those determinations.

10 MR. BORTNICK: All right, your Honor.

11 THE COURT: Do you have anything else?

12 MR. BORTNICK: I don't have anything to add, I guess,  
13 to that.

14 THE COURT: Do the defendants have a position on that?

15 MS. LEVIN: We believe those issues are disputed and  
16 should be presented to the jury, your Honor.

17 THE COURT: Okay. You have some objections to the  
18 charge on page 35.

19 MR. BORTNICK: If I may, your Honor, the first three  
20 items are a mirror of exactly what we talked about on the  
21 verdict form.

22 THE COURT: Okay. Objections to page 24 of our draft  
23 instructions.

24 MR. BORTNICK: The reason for that was it was only on  
25 the third read through -- admittedly, I read it quickly when I

GCDTPIC1

Trial

1 first saw it. We were in a rush last night. But it wasn't  
2 until the third reading that I said okay, I see that  
3 technically, yes, it looks correct, but I was confused, and I  
4 think that the proposed change just makes it clear what the  
5 Court was proposing, and that's why if I was confused.

6 I assume --

7 THE COURT: It seems to me that's a fine edit. I  
8 don't know what the defendant's position is on that.

9 MS. LEVIN: To be honest, your Honor, I'm not entirely  
10 clear what plaintiff's objection is to this page.

11 THE COURT: I think it's an edit, I suppose, that --  
12 does the defendant object to making that change the plaintiff  
13 has suggested?

14 Again, plaintiff's suggestion is that it would read on  
15 page 24: If, however, you find that HSBC was not aware that  
16 Mr. Picarella had complained of the sexual harassment of his  
17 co-worker, or HSBC was not aware that Mr. Picarella had made  
18 either formal or informal complaints of alleged retaliation  
19 against him, then you must find in favor of HSBC with regard to  
20 Mr. Picarella's Title VII claim.

21 MS. LEVIN: We object to that language, your Honor,  
22 for the reason that is articulated in our letter and relates to  
23 a few different places in the proposed instructions, which is  
24 it appears to be an expansion of Mr. Picarella's claims.  
25 Throughout this case he's never alleged that he was retaliated

GCDTPIC1

Trial

1 against for complaining of retaliation, he has consistently  
2 characterized his claims and the protected activity he claims  
3 to have engaged in as complaining of the sexual harassment of a  
4 co-worker.

5 THE COURT: That's a different sort of objection.  
6 We'll get to that shortly. Maybe we should get to that now.

7 MR. BORTNICK: Your Honor, I when I first read it,  
8 because of the "or," if however, you find that HSBC was not  
9 aware Mr. Picarella had complained, okay, or Mr. Picarella had  
10 made formal or informal complaints. And that was -- I just  
11 wanted to make sure that "not aware" was referring to both,  
12 which I think was the Court's intention, because that is  
13 clearly the legal standard. I wanted to make sure that it's  
14 clear that "not aware" applies to both.

15 THE COURT: What if we just strike all of that? What  
16 if we say: If, however, you find that HSBC was not aware that  
17 Mr. Picarella had complained of the harassment of his  
18 co-worker, then you must find in favor of HSBC with regard to  
19 Mr. Picarella's Title VII claim? What if we strike all of  
20 that?

21 MR. BORTNICK: Well, I think he has made complaints.  
22 After he filed the EEOC charge there were continued retaliatory  
23 actions. That's the allegation here. And those didn't have to  
24 do with the sexual harassment, it had to do -- some of those  
25 later ones had to do with that he filed an EEOC charge and yet

GCDTPIC1

Trial

1     retaliate continued.

2             And we have some evidence in the record of that from  
3     Mr. Karam who identified Mr. Picarella -- he said called him, I  
4     think it was the HR related problem, and the question was well,  
5     what was the problem, well, the problem was the EEOC charge  
6     being filed. So that is not complaining of sexual harassment,  
7     that's retaliation in that case for filing an EEOC charge,  
8     evidence that would tend to support that.

9             THE COURT: Let's talk about this other issue that the  
10    defendants have objected to, and I am a little concerned about  
11    that. The plaintiffs did amend their proposed jury  
12    instructions earlier this week, or maybe late last week, to add  
13    information talking about the fact that Mr. Picarella filed the  
14    lawsuit. I don't believe that that is part of the plaintiff's  
15    theory in this case, up until the trial had already begun, but  
16    I want to make sure that I'm not -- what is plaintiff's counsel  
17    position on that?

18            I don't think there's any dispute that there has been  
19    some testimony about that, but I am concerned about sort of  
20    this very late amendment to the sort of proof in this case and  
21    the defendant's notice of what the claims were here in this  
22    case, especially as it regards the -- any alleged retaliation  
23    for filing the lawsuit here in this case.

24            What's plaintiff's position on that?

25            MR. BORTNICK: Well, I don't have the complaint in

GCDTPIC1

Trial

1 front of me, and I will take everyone's word that it's not said  
2 in the complaint, but I would want to check that -- and I would  
3 want to check that.

4 But even if it were not, can't come as a surprise. It  
5 was part of the discovery in the case. Mr. Picarella's  
6 deposition was taken. But it also came in through Mr. Karam,  
7 wasn't objected to, and in that case the pleadings could easily  
8 be conformed, and I ask the pleadings be conformed to the  
9 evidence, which is a very typical motion that is made at the  
10 end of a case.

11 So I don't see how -- there's no possible surprise or  
12 prejudice to defendants on this because they have known every  
13 step of the way what Mr. Picarella has alleged happened to him,  
14 at what point in time, and why he felt that that was improper.

15 THE COURT: Let me hear from defendants on this. Let  
16 me find out what the defendant's position is regarding this  
17 issue. It doesn't appear to me that there's any sort of  
18 surprise regarding Mr. Picarella's filing of the EEOC claim and  
19 the complaints of retaliation for doing that. There may be  
20 some surprise regarding the lawsuit, but let me hear from the  
21 defendant.

22 MS. LEVIN: I think the filing of the EEOC complaint,  
23 your Honor, is identified in the second amended complaint as  
24 protected activity. What is not identified in the second  
25 amended complaint or any of plaintiff's pretrial filings in



GCDTPIC1

Trial

1 this case is that his internal, quote, informal and formal  
2 complaints of retaliation were protected activity and that the  
3 filing of this lawsuit was protected activity.

4 And I think we may have cited some portions of the  
5 pretrial filings to you in our letter, but in the joint  
6 pretrial order, in plaintiff's proposed voir dire questions and  
7 plaintiff's proposed jury instructions, all filed in the weeks  
8 before trial, plaintiff characterized his protected activity as  
9 making complaints about the sexual harassment of a co-worker.

10 So I think there has been prejudice. There has been  
11 surprise. The fact that testimony was presented at trial on  
12 these issues is not sufficient to give defendant advance notice  
13 that the case has been expanded and additional protected  
14 activity is being alleged.

15 THE COURT: Okay. Anything else from plaintiffs on  
16 that? I tend to agree with defendant. If I recall, there were  
17 some objections to certain portions -- not all of this  
18 testimony, but there was certain evidence that I did allow in  
19 to sort of go to the plaintiff's proposed theory regarding sort  
20 of a pattern of retaliation different from the actual claims  
21 here in this case.

22 Let me hear from plaintiff on that.

23 MR. BORTNICK: I don't have anything to add to what I  
24 said prior, your Honor.

25 You're referring to my December 11 letter, is that

GC DTPIC1

Trial

1 what you're referring to? You said my prior letter.

2 THE COURT: Yes, I don't remember the date off the top  
3 of my head.

4 MR. BORTNICK: It was December 11, and then we did a  
5 proposed amended jury instruction. I thought this was sort of  
6 superseded by your Honor's draft jury charge, that's why I  
7 guess -- I was going off your Honor's draft jury charges having  
8 been superseded by the exchange of letters on this topic.

9 And in the letter that -- and so I guess I just was --  
10 when you referred to my prior letter, I was a little confused,  
11 because we were going off of your draft jury charge.

12 THE COURT: We included some of that, some of the  
13 parties' requests, obviously, in the draft charge with the idea  
14 that we would have this sort of discussion at some point, which  
15 we're having now. It does seem to me that it's appropriate,  
16 perhaps, to limit the instruction on page 24 to the complaints  
17 of sexual harassment of his co-worker and the filing of the  
18 EEOC complaint, if that is what is alleged in the second  
19 amended complaint.

20 MR. BORTNICK: Page 24.

21 THE COURT: Correct. I'm looking at your objections,  
22 but that seems to me to make the most sense.

23 MR. BORTNICK: I'm sorry, you're talking about their  
24 objection?

25 THE COURT: Hold on a second.

GCDTPIC1

Trial

1 (Pause)

2 THE COURT: Go ahead, counsel.

3 MR. BORTNICK: Maybe I'm confused, which is quite  
4 possible. The issue on page 24 that we had was, and it's at  
5 the bottom of the letter, other than the not aware issue, was  
6 underneath, wherever in the jury charge it says you must find  
7 for HSBC, and instead we gave as an example an instruction that  
8 should rather say: In order to find for Mr. Picarella, you  
9 must find that he has proved.

10 That was our -- that was the objection. That was the  
11 other objection. For example, on page 24 and 25 is where we  
12 came up with another instance of that.

13 THE COURT: Okay. I understand that, but I was  
14 talking about -- since we were on that, and this sort of  
15 touches upon the defendant's other objection, this is sort of  
16 the defendant's objection to sort of what they perceive as this  
17 late amendment of the complaint in the middle of the trial. I  
18 guess I want to hear from plaintiff's counsel, because it does  
19 seem that the complaint talks about, as a protected activity,  
20 the complaints about the sexual harassment of his co-worker and  
21 the filing of the EEOC complaint.

22 MR. BORTNICK: Right.

23 THE COURT: So it does seem that perhaps on page 24 we  
24 limit it to that.

25 The other option is that we -- if we don't

GCDTPIC1

Trial

1 specifically marshal that evidence in any way and just kind of  
2 generally refer to protected activity we could wait and see  
3 what the jury does and give them special interrogatories if  
4 necessary.

5 MR. BORTNICK: Either one would be fine with us, your  
6 Honor. Either one would be fine.

7 THE COURT: Okay. Then it seems to me it may make the  
8 most sense to kind of limit that to the complaints about the  
9 sexual harassment of the co-worker and the filing of the EEOC  
10 complaint.

11 MS. LEVIN: Your Honor, just to clarify, I think there  
12 are a number of other places throughout the proposed jury  
13 instruction where a similar change needs to be made.

14 THE COURT: Okay, we'll do that.

15 I believe -- are there any other objections from  
16 plaintiff's counsel to the jury instructions?

17 MR. BORTNICK: Just the other one I mentioned a minute  
18 ago about affirmative versus the negative one.

19 THE COURT: Okay, let me hear from defendants.  
20 Defendants have some objections -- again, many of the  
21 defendant's objections appear to be mooted by the fact that the  
22 state charges have been dropped. So the first one that seems  
23 moot now is the objection to the proposed verdict form. We  
24 will put captions above the two claims, Title VII and the New  
25 York City Human Rights ones, I think that makes sense to do

GCDTPIC1

Trial

1 that. I assume there's no objection to that by plaintiff.

2 MR. BORTNICK: No.

3 THE COURT: Again, the second objection again seems to  
4 be moot because the New York State human rights law claims have  
5 been dropped.

6 MS. LEVIN: Sorry, your Honor, I'm not following on  
7 the verdict form, I think we had a request that the yes and no  
8 be flipped since it was plaintiff's burden.

9 THE COURT: Okay, let me make sure I fully understand  
10 what you're saying. Hold on.

11 (Pause)

12 THE COURT: And this is for which question  
13 specifically on the verdict form?

14 MS. LEVIN: Pretty much all of them, your Honor, the  
15 ones the plaintiff bears the burden on. It's our experience in  
16 this district for the "no" to come first on an element where  
17 the plaintiff bears the burden of proof. We obviously defer to  
18 the Court, but we do believe it's improperly suggestive to have  
19 the "yes" come first when it's plaintiff's burden to prove each  
20 of those elements.

21 (Continued on next page)

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GCD9PIC2

1 THE COURT: Plaintiff, your position on that.

2 MR. BORTNICK: I don't see it suggestive as one way or  
3 the other. What's important is I think to be consistent.

4 THE COURT: We'll leave that alone. I don't think  
5 that suggests anything by having a yes before a no.

6 I think in terms of -- I'm looking at page two of your  
7 objections under the Title VII and New York State Human Rights  
8 Law. I do think that we probably should refer to in the third  
9 element protected activity instead of protected conduct. I  
10 think that that probably does make sense. And I do believe  
11 that it makes sense to the extent that it's not clear that the  
12 fourth element should talk about perhaps but for causation,  
13 although we do talk about but for later on in that section,  
14 perhaps it does make sense instead of saying critical element  
15 to use but for there as well.

16 Does that suggestion ameliorate the defendant's  
17 concerns?

18 MS. LEVIN: It does, your Honor.

19 THE COURT: What's plaintiff's position on that?

20 MR. BORTNICK: I thought critical element was proper  
21 although I don't think it's -- that's fine, your Honor.

22 THE COURT: Okay. Looking at page three of the  
23 defendant's objection can you tell me a little bit more about  
24 your objection to the first element there of the Title VII  
25 claim.

GCD9PIC2

1 MS. LEVIN: Of course, your Honor.

2 THE COURT: Again, some of that may be folded in now  
3 that the New York State Human Rights Law claim is out. But let  
4 me hear.

5 MS. LEVIN: It's less about the withdrawal of the  
6 State Human Rights Law claim but I think a number of the -- our  
7 objections on page 23 do relate to the issue that we discussed  
8 earlier about what is the protected activity that's actually  
9 alleged in this complaint. So I think this is just one of the  
10 pages where a number of those changes need to be made.

11 We do have an objection to the language about -- that  
12 HSBC was actually engaged in retaliation at each of these  
13 points in time. We think this presupposes what plaintiff has  
14 to prove which is that there actually was retaliation. And  
15 there was similar language in plaintiff's proposed instruction  
16 that plaintiff later agreed was inappropriate. So we think  
17 that that language should be either modified or removed.

18 THE COURT: So in addition to being clearer about what  
19 the complaint is here let me just hear from defendants. What  
20 is your proposed language?

21 MS. LEVIN: It's the sentence that begins furthermore,  
22 "Furthermore, he does not have to prove that when he filed the  
23 EEOC charge complaint to HSBC that he was retaliated against or  
24 filed this lawsuit that HSBC was actually engaged in  
25 retaliation at each of those points in time."

GCD9PIC2

1           One suggested revision would be, "Furthermore,  
2 plaintiff satisfies this element as long as he had a good faith  
3 reasonable belief that when he filed the EEOC charge that HSBC  
4 was engaging in retaliation."

5           THE COURT: Plaintiff, what's your position on that?

6           MR. BORTNICK: I think it would be not "was engaging"  
7 but "had engaged" in retaliation. And while I think actually  
8 the EEOC -- let me try to say this differently.

9           I have to say that I think the sentence as it's  
10 originally written is probably the best way of dealing with it,  
11 your Honor, because it's saying that Mr. Picarella, the  
12 plaintiff, doesn't have to prove at each single one of these  
13 points in time there's a retaliatory action being taken.  
14 That's what -- and that's what -- that's true. And I think  
15 it's clear as to what it says there. So I think the  
16 instruction, that part, that "furthermore" sentence is correct.

17           MS. LEVIN: Your Honor, the sentence suggests that  
18 plaintiff does not have to prove that HSBC was engaged in  
19 retaliation and I think that's confusing and incorrect as a  
20 matter of law. On this first element the issue is whether  
21 plaintiff had a good faith reasonable belief that the  
22 employer's actions violated Title VII.

23           MR. BORTNICK: Maybe the way, your Honor, to do it is,  
24 "Furthermore, he does not have to prove that when he filed the  
25 EEOC charge," I think maybe this, "or complained to HSBC as



GCD9PIC2

1 being retaliated against, or filed this lawsuit," and maybe  
2 that might make it a little clearer, just an extra "or" in  
3 there.

4 THE COURT: I thought we had talked about the fact  
5 that the filing of the lawsuit and those other things should be  
6 out. We shouldn't put those in the jury instructions, right?

7 MR. BORTNICK: Yes. Okay. That's fine. Yes.

8 THE COURT: What if we said something to the effect  
9 that: Furthermore, Mr. Picarella does not have to prove that  
10 when he complained about the sexual harassment of his coworker  
11 or filed the EEOC charge that he was being retaliated  
12 against -- or that HSBC was actually engaged in retaliation at  
13 each of those points in time; rather, Mr. Picarella must prove  
14 that at the time that he -- rather, Mr. Picarella must prove  
15 that at some point in time HSBC had retaliated against him for  
16 engaging in protected conduct.

17 Does that satisfy both parties?

18 MS. LEVIN: Your Honor, we still have the same  
19 objections, unfortunately. I think there are a few issues.  
20 There's the phrasing of the sentence in the negative,  
21 "Plaintiff does not have to prove" this is an element on which  
22 he bears the burden of proof and he does have to prove that he  
23 had a good faith reasonable belief.

24 I think the other issue with the proposed language is  
25 the reference to retaliation. Retaliation is the ultimate

GCD9PIC2

1 issue in this case that the jury has to decide. I think the  
2 language should rather be, as I stated earlier, whether he had  
3 a good faith reasonable belief that the employer's actions  
4 violated Title VII, either when he complained internally about  
5 sexual harassment of a coworker or when he filed the EEOC  
6 charge.

7 THE COURT: Okay. So give me your proposed language  
8 again, counsel.

9 MS. LEVIN: Absolutely, your Honor.

10 I think it's a modification to the first sentence of  
11 that paragraph. "An employee's complaint may qualify as  
12 protected activity, satisfying the first element of this test,  
13 as long as the employee has a good faith reasonable belief that  
14 the employer's actions violated Title VII. Therefore,  
15 Mr. Picarella must prove that he had a good faith reasonable  
16 belief that HSBC had violated Title VII when he complained  
17 internally of the sexual harassment of a coworker or when he  
18 filed the EEOC charge."

19 THE COURT: Plaintiff.

20 MR. BORTNICK: Obviously, I think it's critical that  
21 it's improper to remove the sentence, "Therefore, Mr. Picarella  
22 does not have to prove that his coworker was sexually  
23 harassed." That's sort of the point, an important point of  
24 this instruction here. You can't take that out; that he  
25 doesn't have to prove that she was harassed; all he has to do

GCD9PIC2

1 is show that he had a good faith reasonable belief. And that  
2 is --

3 THE COURT: I don't know if the defendants were  
4 suggesting removing that.

5 MS. LEVIN: I don't have any objection to keeping that  
6 language in.

7 MR. BORTNICK: Because she eliminated that and that's  
8 why I -- okay.

9 The way it was phrased it seems as if it's taking out  
10 Mr. Picarella's internal complaints which are also, for which  
11 he was retaliated against. That's been part of this case. And  
12 by just limiting it, I guess -- maybe I misheard -- to filing  
13 the EEOC charge and eliminating the internal complaints it's  
14 unnecessarily improperly limiting his case.

15 THE COURT: Okay. I believe it is important to  
16 include his complaints about the sexual harassment of a  
17 coworker if that's what you're talking about.

18 MR. BORTNICK: Yes, and not just the EEOC charge.

19 MS. PALMIERI: But also his complaints internal  
20 regarding how he was retaliated against. So I understood your  
21 Honor to be saying before that we would exclude reference to  
22 the lawsuit but I think to limit it solely to the EEOC charge  
23 and not to also include the more informal internal complaints  
24 of retaliation, which also constitute protected activity,  
25 unduly limits the claim.

GCD9PIC2

1 THE COURT: What's defendant's position on that?

2 MS. LEVIN: Defendant's position on that is this has  
3 already been addressed by your Honor and it's not within the  
4 scope of the case as it's been delineated prior to trial. The  
5 case has always been focused solely on the internal complaints  
6 regarding the sexual harassment of a coworker and the EEOC  
7 charge. Those were the two types of protected activity that  
8 have been alleged throughout this case.

9 THE COURT: Hold on a second.

10 Let me hear from plaintiffs as to why you feel these  
11 other internal complaints not directly related to the sexual  
12 harassment of his coworker are contained in the complaint.  
13 Because it seems to me, looking at the complaint, there were  
14 certainly references to -- looking at the second amended  
15 complaint, it talks about other complaints that were listed by  
16 Picarella, in paragraph 72 on page 18, and it's listed, the  
17 complaints that were I believe e-mailed to Maria Malanga as  
18 unacceptable behavior in the organization, sexual harassment,  
19 ongoing bullying culture, fraud, and then it states, to date  
20 the unacceptable behavior has been handled inappropriately, and  
21 things of that nature.

22 But the real issue is in paragraph 106 and 107. In  
23 paragraph 107 it says from in or around January 2012 to the  
24 present plaintiff opposed the defendant's sexual harassment of  
25 his female coworker by engaging in the protected activity

GCD9PIC2

1 identified in the preceding paragraphs.

2 So I suppose the question is, it seems to me that that  
3 is limited to the internal complaints surrounding the sexual  
4 harassment of his female coworker and it's not talking about,  
5 in your second claim for relief, any retaliation related to his  
6 other potentially protected activity such as complaining about  
7 bullying and other things directed at him.

8 MR. BORTNICK: Well, the sort of sum of that bullying,  
9 for lack of a better word, is part of the retaliation that he's  
10 experiencing. It's all part of one continuum. And the  
11 evidence certainly, that we've heard at trial and also from the  
12 complaint, it really talks about a continuum.

13 THE COURT: No. That's fine. I guess what I'm  
14 trying --

15 MR. BORTNICK: And that these other acts are just  
16 other forms in a sense of retaliation and complaining about  
17 I'm -- I'm continually being retaliated against, it's getting  
18 worse and worse and worse is what we're talking about here. So  
19 I think it is appropriate. And it's a fair reading of the  
20 complaint as well as what's occurred here at trial.

21 THE COURT: But that seems to me different. It's a  
22 difference to say that any alleged bullying of him by his  
23 coworkers or supervisors, any bullying of him is an act of  
24 retaliation for complaining about the sexual harassment of his  
25 coworker as opposed to saying that the complaining about the

GCD9PIC2

1 bullying is protected activity and that he was retaliated  
2 against for complaining about the bullying as an internal  
3 complaint.

4 It seems to me that what we're talking about is based  
5 on the complaint, the claims in this case appear to be limited  
6 to the complaints he made, the protected activity regarding the  
7 sexual harassment of his coworker and his filing of the EEOC  
8 complaint. That's what I'm trying to figure out because you  
9 keep talking about the other internal complaints. If you're  
10 talking about internal complaints about the sexual harassment  
11 of his female coworker, that's fine.

12 MR. BORTNICK: And I think you know and the evidence  
13 was there was actually some of both because some of it,  
14 Mr. Picarella testified: I was making these complaints because  
15 Ms. Bilbrey had said anything that I see or feel is wrong I  
16 should report. Not all of those rose to retaliation. But  
17 other things, I think he said, did and, you know, rise to a  
18 level of retaliation or arising out of the initial incident.

19 I guess, yes, in a certain sense I understand -- if  
20 we're saying that all of these additional things happened to  
21 him or some of these additional things that happened to  
22 Mr. Picarella were a result of the EEOC charge and the original  
23 complaint, sexual harassment, we can look at that, yes.

24 THE COURT: Okay. That's what that seems to be  
25 because I thought your cocounsel was saying something different

GCD9PIC2

1 just now. I don't know.

2 MR. BORTNICK: She was but, you know, understanding  
3 what your Honor is saying about the complaint. And I think at  
4 the end of the day I'm not sure how much of a difference it's  
5 ultimately going to make with the jury.

6 THE COURT: Okay. Let's turn to the defendant's next  
7 objection. It seems the objection to the second element has  
8 been addressed in terms of the limiting of the claims in this  
9 case.

10 What's the defendant's objection to the third element  
11 of the Title VII claim proposed jury instruction at 24? I'm  
12 not sure -- it seems that, again, you're not objecting that  
13 that's an incorrect statement of the law but you're just saying  
14 that that's not particularly relevant in this case. Is that  
15 basically what the objection is?

16 MS. LEVIN: Well there are a few objections. I think  
17 the first one, your Honor, is that typically case law refers to  
18 an adverse employment action, a materially adverse employment  
19 action. We think that language should be used here.  
20 Mr. Picarella is not alleging that he experienced any adverse  
21 action outside the scope of his employment at HSBC.

22 The other two objections we had, your Honor, to this  
23 language is we think that there should be the additional  
24 language we had suggested in our proposed jury instruction  
25 regarding petty slight and minor annoyances not rising to the

GCD9PIC2

1 level of a materially adverse employment action and that  
2 whether an adverse employment action is material should be  
3 judged from the perspective of a reasonable employee in  
4 Mr. Picarella's position.

5 THE COURT: Let's deal with that first one first. It  
6 seems to me that it's -- well what's plaintiff's position on  
7 that, the adverse action itself?

8 We can add "materially adverse action itself, however,  
9 need not be related to the plaintiff's employment." It does  
10 seem that we could take that out; we could leave it in. What's  
11 plaintiff's position on that?

12 MR. BORTNICK: Maybe I'm misunderstanding but I  
13 thought I heard two things. One is that there's -- there's  
14 sort of a request to talk continually about materially adverse  
15 action. I think, if I'm understanding that right, the first  
16 sentence says, "With respect to the third element an adverse  
17 action is material." I'm just not sure I understand the  
18 objection.

19 THE COURT: So forgetting that adjective what is your  
20 position on this sentence?

21 MR. BORTNICK: On this sentence?

22 THE COURT: Yes.

23 MR. BORTNICK: I guess the -- it has to be an  
24 employment action, I guess -- well, they could take actions  
25 against Mr. Picarella outside the scope of his employment but



GCD9PIC2

1 it would be that would be retaliatory. I think we've had --  
2 you know, to the extent we've either had evidence or expect  
3 there to be some evidence, for example, about a press article  
4 that put Mr. Picarella in a bad light, that would be not  
5 related to his employment per se, but it's a retaliation. It's  
6 a correct statement of the law.

7 THE COURT: It seems to me it's a correct statement of  
8 the law. It can stay in. Again, I don't think -- the jury  
9 will determine whether or not that's particularly relevant in  
10 this case or not.

11 In terms of the next issue, perhaps given the  
12 testimony in this case in terms of advising the jurors that  
13 petty slight or minor annoyances are not actionable under Title  
14 VII, maybe that makes some sense. There was some testimony  
15 about Mr. Picarella complaining about humming next to him and  
16 things like that and perhaps it would be helpful for the jury  
17 to know -- I'm not ruling that the humming itself could not be  
18 actionable. But the jury needs to know that it must be some  
19 real humming, I guess.

20 MR. BORTNICK: I think that falls into what I said  
21 earlier that he was reporting sort of anything as he understood  
22 he was supposed to report, not that he thought that was some  
23 retaliation against him. I thought he was pretty clear. He  
24 didn't consider that retaliatory activity against him. And  
25 that wasn't the purpose of him doing it.

GCD9PIC2

1           So that's fine, your Honor, as long as there's some  
2 sort of limiting factor that if it's only petty slight and  
3 things, you know, some sort of word like that, then  
4 Mr. Picarella couldn't prevail. I don't want the jury to get  
5 the impression that everything -- that if they're petty and  
6 non-petty things that he can't prevail. That would be the only  
7 suggestion.

8           THE COURT: What's defendant's position on that if we  
9 add something that says that only petty slight or minor  
10 annoyances are not actionable under Title VII?

11           MS. LEVIN: I don't think that's a correct statement  
12 of the law. I think the language we propose comes directly  
13 from a case and is the language that you repeatedly see in  
14 cases on what is a materially adverse employment action. So I  
15 would submit that that's the proper language to be used.

16           MR. BORTNICK: I think the difference is when you have  
17 someone that's complaining largely only about petty slights  
18 it's an appropriate instruction, but that's not what we have  
19 here.

20           THE COURT: I guess what I'm concerned about is not so  
21 much just how counsel views that testimony but if there's a  
22 chance that the jury could be misled and the jury might think  
23 that if someone is -- if someone is humming, if it's a Sam Cook  
24 hum in a song perhaps that is more of a petty annoyance if you  
25 don't like Sam Cook. As opposed to some field workers humming

GCD9PIC2

1 in a very loud manner, maybe that's not a slight annoyance. It  
2 seems to me that the jury is free to do what they wish but  
3 perhaps they should be told that petty slights or annoyances  
4 because your theory it seems is not focused on petty slights or  
5 annoyances; it's about him getting fired.

6 MR. BORTNICK: Correct. And that's why I suggested  
7 that that is fine as long as it's made clear to the jury  
8 that -- and that's why I used not only type of language. If  
9 the -- so that the jury understands that maybe petty slights  
10 are not actionable, for lack of a better word or, you know,  
11 they can't return a verdict based on petty slights, but if  
12 they're petty slights and other things, other more serious  
13 things, then they should return a positive response on that  
14 issue.

15 THE COURT: But that's not right, is it? I mean it's  
16 kind of right but it's not right. If you say petty slights and  
17 other things. It's not because it's petty slights combined  
18 with other things. It's the other things.

19 MR. BORTNICK: Right.

20 THE COURT: So it seems to me that that language may  
21 make it actually worse for you. If I start saying that mere  
22 petty slights and annoyances are not enough, the jury might be  
23 tempted to start conflating all of that stuff together.

24 MR. BORTNICK: I think you can say if he suffered only  
25 petty slights, then it would not be enough. That's where I was

GCD9PIC2

1 going with that point.

2 THE COURT: I think that sort of starts misleading the  
3 jury in another way, to start focusing on slights and to  
4 determine whether or not there were more than petty slights  
5 without necessarily regarding the rest of the instructions  
6 there. So I'm inclined to include that language as suggested  
7 by defendants. It doesn't seem that there's any real harm to  
8 plaintiffs because my assumption is that the plaintiffs are not  
9 going to be focusing on the humming. Maybe the defendants  
10 will, but I don't think that that's part of the plaintiff's  
11 real theory in this case.

12 As far as the next part, "judge from the perspective  
13 of a reasonable employee in Picarella's position," what's the  
14 plaintiff's -- let me find out really more about what the  
15 defendants objection is to that.

16 MS. LEVIN: We're asking that that language be  
17 included, your Honor, and I think this and the petty slight  
18 issue just go to the fact that a materially adverse employment  
19 action is a term of law that some of the jurors may not fully  
20 understand. And so these instructions aren't -- are intended  
21 to give more clarity on what it means to be material in the  
22 context of an adverse employment action.

23 THE COURT: Plaintiffs, what's your position on this?

24 MR. BORTNICK: That's fine.

25 THE COURT: All right. We'll include that.

GCD9PIC2

1 Fourth element. Okay. The defendant's objection to  
2 the fourth element seems to be centered on the sort of  
3 motivating language -- the motivating factor language.

4 MS. LEVIN: Your Honor, that relates to the state law  
5 claim so I think we can skip over that.

6 The objection that we have is on page 25 of the  
7 proposed jury instructions.

8 THE COURT: Okay.

9 MS. LEVIN: And it's simply just the sentence  
10 beginning "If you find that Mr. Picarella did not prove that he  
11 would not have suffered." We just feel that that statement is  
12 a little confusing because of the double negative. We don't  
13 think it's a misstatement of the law but it's just a tad  
14 difficult to follow.

15 THE COURT: So what do you suggest?

16 MS. LEVIN: We suggest just tracking the language in  
17 the Supreme Court's decision in Nassar which is -- which  
18 requires the plaintiff to establish by a preponderance of the  
19 evidence that retaliation was the but for cause of the  
20 materially adverse action, which is the unlawful retaliation  
21 would not have occurred in the absence of the alleged wrongful  
22 action or actions of the employer.

23 THE COURT: What's plaintiff's position on that?

24 MR. BORTNICK: I had trouble following it. Maybe if I  
25 read it. But the other issues -- that's also what we had

GCD9PIC2

1 raised, your Honor, that we talked about earlier; so I don't  
2 know if we need to go over it again.

3 But on page four of our letter, the second to last  
4 paragraph there where we objected to paragraphs in the jury  
5 charge says you must find for HSBC and we suggested alternative  
6 language for that page 25. "If you find that Mr. Picarella did  
7 not prove that he would not have suffered any of the material  
8 adverse actions had he not complained then you must find -- I'm  
9 sorry -- I'm sorry. That's what's written. It should say  
10 that, "This means in order to find for Mr. Picarella you must  
11 find that he proved that he would not have suffered any of the  
12 material adverse actions had he not complained." We wrote that  
13 in the instruction. We identified that as sort of a different  
14 objection.

15 THE COURT: What's the defendant's position on that  
16 language? Does that cure your issue as well?

17 MS. LEVIN: Your Honor, I'm just reviewing the  
18 proposed language.

19 THE COURT: Okay.

20 MS. LEVIN: I'm looking at it on the screen. Thank  
21 you.

22 One way of dealing with this, your Honor, and this is  
23 just a suggestion.

24 THE COURT: What if we did this, before you make your  
25 suggestion, maybe it's the same suggestion.

GCD9PIC2

1           What if we change that and used as the first sentence  
2           what the defendants have proposed and as the second sentence  
3           what plaintiffs have proposed since you're addressing slightly  
4           different issues. But I guess that wasn't your suggestion.

5           MS. LEVIN: It was not, your Honor.

6           THE COURT: So what's your suggestion?

7           MS. LEVIN: We do object to the language that  
8           plaintiff proposed. We think that it's perfectly acceptable to  
9           suggest to the jury you must find in favor of HSBC if plaintiff  
10          fails to satisfy his burden.

11          What I was going to suggest was just -- as a way of  
12          removing the double negative in the sentence was to change it  
13          to, "If you find that Mr. Picarella failed to prove that he  
14          would not have suffered any of the material adverse actions had  
15          he not complained." I think that clarifies it a little more  
16          instead of having three nots in a row.

17          THE COURT: Okay.

18          MR. BORTNICK: I think the "failed to prove" is okay  
19          but we still strongly maintain the objection about the language  
20          regarding, "then you must find in favor of HSBC" as opposed to  
21          what we proposed on this one, which -- well I don't know if I  
22          need to repeat it again. But we wrote, "This means in order to  
23          find for Mr. Picarella you must find that he has proved," just  
24          put it in the positive and not the negative. So I guess the  
25          word "failed" wouldn't even be part of it now, thinking about

GCD9PIC2

1 it.

2 Our instruction really is the issue here, is the heart  
3 of our issue.

4 THE COURT: Okay. Let me hear defendant's proposed  
5 language again.

6 MS. LEVIN: Defendant's propose language was, "If you  
7 find that Mr. Picarella failed to prove that he would not have  
8 suffered any of the material adverse actions had he not  
9 complained about the sexual harassment then you must find in  
10 favor of HSBC with regard to Mr. Picarella's Title VII claim."

11 THE COURT: And what's plaintiff's language again?

12 MR. BORTNICK: "This means in order to find for  
13 Mr. Picarella you must find that he has proved that he would  
14 not have suffered any of the material adverse actions if or had  
15 he not complained about the sexual harassment or retaliation."

16 THE COURT: So why don't we switch it around, use  
17 plaintiff's statement first followed by defendant's statement.  
18 Then they get both. They get it all and it's clear.

19 MR. BORTNICK: That would be fine as long as we did it  
20 for all of the other places that we've pointed it out in the  
21 jury instructions, yes.

22 THE COURT: Hold on. Let me just check.

23 So we'll make that change. We'll use plaintiff's  
24 language, then defendant's language in that section.

25 Were there other sections you wanted to do that as



GCD9PIC2

1 well in?

2 MR. BORTNICK: Yes, your Honor. It's in our letter.  
3 I think similar language is on page 24, I think. That would be  
4 under the third element.

5 THE COURT: Okay.

6 MR. BORTNICK: And, again, it would occur under the  
7 second element as well also on page 24.

8 THE COURT: Okay.

9 MR. BORTNICK: I don't believe it occurs anywhere  
10 else. Just on those --

11 THE COURT: Yes. Defense counsel.

12 MS. LEVIN: Defendant objects, your Honor. We're  
13 perfectly fine with the language that you proposed on the but  
14 for causation issue under Title VII but what plaintiff appears  
15 to be proposing is to remove any reference in the jury  
16 instructions to the fact that if plaintiff fails to satisfy his  
17 burden then the jury must find for HSBC. And we think that  
18 that language is appropriate and shouldn't be stricken from any  
19 of the proposed instructions.

20 THE COURT: I don't believe that's -- I think  
21 plaintiff's counsel was suggesting that we double up in every  
22 section that we use plaintiff's language saying that in order  
23 to find for plaintiff he has to do this and then next say if he  
24 fails to do this you must find for HSBC in each of those  
25 sections. So he's not talking about striking that language

GCD9PIC2

1 from any of those sections, I don't believe.

2 Am I correct?

3 MR. BORTNICK: Well it was your Honor's suggestion  
4 that we were going along with as compromise. If we can't have  
5 a compromise, then obviously we maintain our original objection  
6 in that case.

7 THE COURT: So it seems to me that it makes sense to  
8 just double it up in all of those sections.

9 MS. LEVIN: That's fine, your Honor. I think that's  
10 already done in a lot of the proposed instructions where it  
11 lays out what plaintiff bears the burden of proving, then  
12 there's a sentence saying that if, however, you find that  
13 plaintiff failed to satisfy his burden then you must find in  
14 favor of HSBC. So I think that's already how many of the  
15 instructions are structured.

16 THE COURT: That's sort of what happened with this  
17 instruction when we first went down this path as well. It was  
18 sort of there in substance as well but counsel objected to the  
19 language.

20 MS. LEVIN: We objected to the language because we  
21 felt it was confusing with three nots in one sentence.

22 THE COURT: That's fine. We'll make that change.

23 Is there anything else? I don't believe there are any  
24 other objections.

25 From plaintiff?

GCD9PIC2

1 MR. BORTNICK: No.

2 THE COURT: Any other objections from defendants?

3 MS. LEVIN: Not on the Title VII instructions, your  
4 Honor, no.

5 THE COURT: Okay. Any other objections from  
6 defendants?

7 MS. LEVIN: Your Honor, many of our objections to the  
8 city law claim I think have already been mentioned but I would  
9 just submit that they should be made within the section of the  
10 instructions addressing the city law claims, specifically the  
11 issue I raised before where the city law claim requires a  
12 causal connection between the protected activity and the  
13 adverse employment action.

14 Then we did have some objections to the damages  
15 instructions when your Honor is ready to address those.

16 THE COURT: The damage instruction it seems to me that  
17 your objection is that -- well I don't want to put words in  
18 your mouth. Is your objection to the damages instruction that  
19 somehow the jury is going to think that increases in salary is  
20 tantamount to a bonus?

21 MS. LEVIN: No, your Honor. Our objection is that  
22 plaintiff has stipulated that he's not entitled to damages  
23 based on increases in salary or bonuses and, in fact, there's  
24 case law that we've cited to your Honor from the Second Circuit  
25 holding that seeking damages based on future pay raises or

GCD9PIC2

1 bonuses are both speculative.

2 THE COURT: Okay. What's plaintiff's position on  
3 that?

4 MR. BORTNICK: Pay raises we do have the issue of  
5 whether the jury find -- could find -- they may not find but  
6 they could find that he should have had the promotion which had  
7 a higher compensation level.

8 As far as bonuses there was a pattern of getting  
9 essentially the same bonus each and every year that he was  
10 there up until the time he was gone. So I guess -- I'm just  
11 trying to understand what the -- what they're trying to do. If  
12 they're trying to limit him to any backpay must be \$225,000 a  
13 year, if that's where they're going here, I think that that's  
14 wrong and it's certainly not in accord with the testimony, the  
15 unchallenged testimony of this case.

16 THE COURT: Well their objection is not based on the  
17 testimony. Their objection is based on a claim that you  
18 stipulated to something earlier on in this case that you  
19 weren't seeking any damages for bonuses or increases in salary  
20 and also the reference to some case law regarding increases in  
21 salary. That's their objection.

22 MR. HUBBARD: Your Honor, I signed that stipulation.  
23 That's not what it says. We should get it out.

24 But what I think she's referring to is that -- is  
25 referring to future changes in the bonus of the salary from the

GCD9PIC2

1 time -- you know, going forward. I think that's what she's  
2 referring to. But we should look at the stipulation because it  
3 has the language in it.

4 But we certainly didn't waive any claim to his loss of  
5 his underlying earning capacity which had a bonus component to  
6 it. So just so there is no confusion about that.

7 In other words, I'm going to argue to the jury that  
8 his earning capacity is either the \$280,000 which is his base  
9 pay plus his -- the bonus he got every year or his loss of  
10 earning capacity is what he would have been paid had he not  
11 been passed over for the other position. Just to be clear.

12 THE COURT: Okay. Anything else from plaintiffs on  
13 this?

14 MR. BORTNICK: No, your Honor.

15 THE COURT: Okay.

16 Defendants.

17 MS. LEVIN: Well, your Honor, I think the stipulation  
18 is clear. If you'd like a copy, I have one. It was also  
19 attached as an exhibit to our 50(a) motion which was filed on  
20 ECF last evening after court.

21 THE COURT: Do you have it with you now? A hard copy?

22 MS. LEVIN: I do.

23 THE COURT: Let me look at it now then.

24 MS. LEVIN: It was in the binder of stipulations that  
25 your Honor was given earlier in the trial. I don't know if

GCD9PIC2

1 your Honor still has that.

2 THE COURT: I think I have that back in chambers. Do  
3 you have a hard copy of that?

4 MS. LEVIN: Can Mr. Jackson approach?

5 THE COURT: Yes.

6 Let me hear from plaintiff's counsel on that.

7 MR. BORTNICK: This was intended, at least from the  
8 plaintiff's perspective, to talk about anything above -- if  
9 he's, as my colleague said, in his job he was getting roughly  
10 280 a year base and bonus, each and every year. This wasn't  
11 intended to say that he can't claim that as damages in backpay  
12 or even front-pay. And, likewise, if he's in a different job,  
13 whatever that job would have -- the compensation level would  
14 have been in that other job such as had he received the job of  
15 Ms. Jenner.

16 THE COURT: Let me hear from defendants.

17 MS. LEVIN: Respectfully I disagree with that  
18 characterization of the stipulation. I think it's clear that  
19 plaintiff would not argue or put into evidence anything  
20 relating to pay raises or bonuses that plaintiff allegedly  
21 would have received while employed by defendant but for his  
22 alleged protected activity because there was no evidence on  
23 this issue presented at trial per the stipulation. I don't  
24 understand what the jury could base such a damage calculation  
25 on other than pure speculation. And I think that your Honor

GCD9PIC2

1 can rule as a matter of law that this issue should not be  
2 presented to the jury because it would call for improper  
3 speculation.

4 MR. HUBBARD: Your Honor, this is designed to address  
5 raises. It was designed to address increases in his pay or his  
6 bonus, not to prevent him from arguing with respect to what his  
7 underlying earning capacity was.

8 And the reason for that is that this stipulation is  
9 based upon some cases that were submitted with it. And those  
10 cases reflect just that. They don't say that you can't base  
11 your claim of lost earnings on what you, in fact, were being  
12 paid while you were there.

13 THE COURT: Okay. The language says, "Plaintiff and  
14 his attorneys shall not in any way refer to, argue, interrogate  
15 any witness concerning, submit evidence regarding, comment  
16 upon, or otherwise mention in the trial, whether during voir  
17 dire, opening statements, trial, or closing arguments, that any  
18 award of damages should include damages based on a pay raise or  
19 bonus, bonuses that plaintiff allegedly would have received  
20 while employed by defendant but for his alleged protected  
21 activity."

22 How does that stipulation allow you to argue about  
23 bonuses? If your point is that you feel that you can still  
24 talk about his base salary, not including the bonuses, as part  
25 of his damages calculation, that seems that that's fair with

GCD9PIC2

1 this stipulation. But when you say that his base salary is  
2 \$280,000 and you're including the bonus in that base salary, if  
3 that's what you're doing, it sounds like that's what you're  
4 doing, that seems to me to be incorrect?

5 MR. HUBBARD: No, your Honor. That is designed to say  
6 that you can't argue that you would have received higher  
7 bonuses while employed had you not been -- I haven't argued  
8 that had he not been retaliated against that his bonuses in  
9 those years would have been higher than what it was. But  
10 clearly in terms of what he's lost, it includes what his -- in  
11 terms of backpay, he would lose what his -- what his base  
12 salary and bonus was and in the future his earning capacity,  
13 even at HSBC, was his base pay plus his bonus. The purpose of  
14 this, based on the cases he submitted, was not to argue that in  
15 the future his bonuses would have gone up or in the future he  
16 would have gotten instead of a fifty thousand dollar bonus a  
17 two hundred thousand dollar bonus. But his earning capacity is  
18 reflected by what he was paid.

19 THE COURT: Why aren't the bonuses speculative?

20 MR. HUBBARD: Sir?

21 THE COURT: Why aren't the bonuses speculative?

22 The bonus isn't something that's set in stone. You  
23 have all sorts of testimony about what he expected his bonus to  
24 be and he testified about how bonuses changed based on things  
25 that are going on in the economy and things that are going on



GCD9PIC2

1 at HSBC and I'm not sure what other purpose there is for you  
2 entering into this stipulation.

3 I mean, again, you're asking me to read basically  
4 outside of the document, right? This stipulation is a  
5 contract. Looking at the words of this stipulation --

6 MR. HUBBARD: Your Honor, I signed it because based  
7 upon the case law the case law does not say what counsel says  
8 it says. It does not say that he's prohibited from relying  
9 upon his earning capacity at the firm.

10 THE COURT: Then why not put that in the stipulation  
11 or why sign the stipulation then?

12 MR. HUBBARD: Because I believed when I worked on that  
13 with Ms. Fiebig in the back we talked about it extensively and  
14 I thought it was clear what we understood it to be.

15 THE COURT: So then why would you include the word  
16 "bonuses" then. You keep talking about this desire to talk  
17 about his bonuses and you're trying to lump bonuses in to  
18 somehow that being his base salary when all the testimony has  
19 been that the bonuses change from year to year. Why include  
20 that in the stipulation?

21 MR. HUBBARD: Your Honor, there was never any  
22 suggestion anywhere that his bonus was part of his base salary,  
23 never. It was not. His bonus was not part. He received  
24 basically the same bonus, \$55,000, every year. It was not part  
25 of his base salary. His base salary was 225. That was what

GCD9PIC2

1 the testimony was. And that was clearly his earning capacity  
2 while he was employed at the firm. And the purpose of that was  
3 to -- based on the case law that was submitted with it, was  
4 to -- we agreed that we would not argue that had he been there  
5 that he would have received increased salary or increased bonus  
6 compensation because it would have been discretionary. But  
7 certainly the evidence suggests that that was a pattern of  
8 paying him at least fifty or fifty-five thousand dollars that  
9 was his bonus earning capacity at the firm.

10 The case law suggests that you can't jump into -- you  
11 can't say that he should have been paid two hundred thousand or  
12 three hundred thousand because clearly that's discretionary.  
13 But the \$55,000 is part of his earning capacity while he was at  
14 the firm. That was not the purpose of that stipulation.

15 THE COURT: Hold on a second.

16 What about this? Hold on a second.

17 So what about in this section, looking at say the  
18 backpay damage section on page 40, if we get rid of part of  
19 that, if we start off with "You may award as actual damages an  
20 amount that reasonably compensate Mr. Picarella for any lost  
21 wages and benefits," and we take out the "taking into  
22 consideration any increases in salary and benefits" and simply  
23 have, "You may award as actual damages an amount that  
24 reasonably compensates Mr. Picarella for any lost wages and  
25 benefits" or perhaps just saying "taking into consideration any

GCD9PIC2

1 wages and benefits that Mr. Picarella would have received had  
2 he not been discriminated against."

3 MR. HUBBARD: Yes, your Honor.

4 THE COURT: And then if the jury awards damages we can  
5 send them special interrogatories, if necessary, and have them  
6 breakdown what these damages are and what these damages have  
7 consisted of and find out what the jury is doing, if necessary.  
8 And then we can make a determination whether or not the jury  
9 has, in fact, given an award of damages for bonuses and the  
10 like. Maybe it will be obvious from the jury's verdict, but  
11 how is that for a suggestion from counsel?

12 MR. HUBBARD: Well, your Honor, I think if you take  
13 out the qualifying language it certainly does eliminate the  
14 possibility that the jury might add on but we haven't offered  
15 any evidence of any add-on in the backpay period. So I think  
16 it would be appropriate to make that modification that you just  
17 posed.

18 THE COURT: Defendants.

19 MS. LEVIN: The Court's proposal is acceptable to  
20 defendants, your Honor.

21 THE COURT: So we'll make that modification. We'll  
22 take that clause out and we'll see what happens when the jury  
23 comes back with their verdict.

24 I believe that takes care of all of the defendant's  
25 objections.

GCD9PIC2

1           Is that correct? Are there other objections from the  
2 defendants?

3           MS. LEVIN: Your Honor, we had noted a few objections  
4 on page six of our letter. We'll defer to the Court's wisdom  
5 on those. I don't think we need to argue about them today.

6           THE COURT: There's one that I punted on before.  
7 Let's get back to that. Let me hear counsel again on that  
8 issue.

9           MR. BORTNICK: Which one?

10          THE COURT: I'm trying to remember.

11          MR. BORTNICK: That may have been -- maybe I'm  
12 mistaken, that was the issue of -- well --

13          THE COURT: I think it was the issue under the New  
14 York City law claims in terms of the language, in terms of, for  
15 the fourth element, in terms of motivating factor or played any  
16 role or things of that nature.

17          Counsel wish to be heard any further on that? I'll go  
18 think about this and make a decision on that.

19          MR. BORTNICK: I thought we covered that and I gave  
20 your Honor what I believed we proposed.

21          THE COURT: Defendants want to be heard any further on  
22 that?

23          MS. LEVIN: We respectfully suggest that the Court  
24 review the cases that we've cited. Other than that we have  
25 nothing further.

GCD9PIC2

1 THE COURT: So here's what I suggest we do at this  
2 point. The jury, I believe, is all here. Is that right, Tara?

3 THE DEPUTY CLERK: Yes.

4 THE COURT: The jurors are all here. What I suggest  
5 we do at this point is continue on with the testimony of this  
6 witness. Does plaintiff's counsel have a sense of how long  
7 your cross-examination of this witness is going to be.

8 MR. HUBBARD: Very short, your Honor. Ten minutes,  
9 maybe.

10 THE COURT: And then defense counsel, do you have a  
11 sense of if there's going to be any redirect at this point? I  
12 guess you don't. I guess you can't.

13 MR. JACKSON: I'm not anticipating significant  
14 redirect, your Honor.

15 THE COURT: After that, after this witness, I don't  
16 believe the defendants have any other witnesses; is that  
17 correct or is that incorrect? Does the defendant have any  
18 other witnesses after this witness?

19 MR. JACKSON: This is our final witness, your Honor.

20 THE COURT: And then the defendants will rest.

21 MR. JACKSON: Apart from one issue, your Honor, which  
22 is the stipulation that the Court -- that we discussed  
23 yesterday which we sent to defense counsel last night, which  
24 basically just said the parties -- I'll read what we proposed  
25 which we thought was consistent with what Mr. Hubbard said he

GCD9PIC2

1 would agree to at the conference. It just says, "The parties  
2 to the above-captioned action hereby stipulate and agree that  
3 Mr. Picarella retained legal counsel in connection with this  
4 matter in December of 2012."

5 THE COURT: Okay. That's stipulated to?

6 MR. JACKSON: No. Mr. Hubbard has informed us that on  
7 reflection he doesn't -- he's not willing to sign the  
8 stipulation.

9 MR. HUBBARD: That's not what I said. I said I  
10 understood your Honor yesterday when we argued it to agree with  
11 us that that was an inappropriate stipulation, that was not an  
12 issue -- when counsel was retained was not an issue in the case  
13 and it would unduly highlight it and potentially put it in  
14 evidence in a way that it could be commented on. That was my  
15 recollection of the conversation yesterday. If your Honor got  
16 the impression that I agreed to the stipulation I will abide by  
17 that.

18 THE COURT: My impression was that you were seriously  
19 considering the stipulation. That was the conversation prior  
20 to you opening the door by asking Mr. Picarella those -- asking  
21 those questions. And then once that came in, that's when I  
22 felt that the stipulation was necessary to avoid any  
23 misimpression with the jury that Mr. Picarella hired counsel  
24 immediately when he filed the EEOC complaint. I had previously  
25 indicated that it wasn't relevant. But that door has been

GCD9PIC2

1 opened so I think that that stipulation is necessary just to  
2 avoid that confusion.

3 MR. HUBBARD: May I look at the language then again of  
4 the stipulation?

5 THE COURT: Yes.

6 MR. HUBBARD: Thank you.

7 Your Honor, just so I'm getting back in my mind but  
8 your Honor indicated that you would not permit that to be  
9 argued to the jury in terms of how it impacted his complaints  
10 and the appearance of counsel.

11 THE COURT: That is correct. That is a stipulation  
12 that will be received in evidence to sort of clear up any  
13 misunderstanding. Defense counsel will not be allowed to argue  
14 about the fact that counsel was retained had an impact on  
15 Mr. Picarella's complaints, internal complaints regarding the  
16 sexual harassment.

17 MR. HUBBARD: Thank you, your Honor. Thank you.

18 MR. JACKSON: Thank you, Judge.

19 THE COURT: So what I suggest we do at this point is  
20 we're going to need to -- my staff will work on making these  
21 corrections to the jury instructions and the verdict form.  
22 What I suggest we do is -- here are the possibilities. We  
23 bring the jury in. We need to bring them in any way, let them  
24 know what's happening. Bring the jury in. We can finish with  
25 this witness. Defense counsel can rest on the record. And I

GCD9PIC2

1 assume defense counsel or maybe plaintiff's counsel will be  
2 making a motion at that point.

3 MR. JACKSON: Yes, your Honor. I mean we -- I would  
4 just say -- I was going to say before the conclusion of this,  
5 it's our understanding that under the 2006 amendment to the  
6 rules there is no longer a necessity for us to renew our 50  
7 motion at the close of all evidence. But if plaintiff's  
8 counsel would agree that that's deemed renewed to whatever  
9 extent there would be an argument of waiver, we won't need to  
10 break with the jury if we have agreement on that.

11 MR. HUBBARD: Yes.

12 THE COURT: So.

13 (Continued on next page)  
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GCDTPIC4

1 THE COURT: So defense counsel will rest, and is there  
2 rebuttal case from the plaintiff?

3 MR. HUBBARD: Yes.

4 THE COURT: What will that consist of?

5 MR. HUBBARD: Mr. Picarella's testimony.

6 THE COURT: And give me an offer of proof about that.

7 MR. BORTNICK: Again, your Honor, there was the -- one  
8 of the things in this case is that even though we may have  
9 called -- plaintiff may have called certain witnesses, they  
10 were also witnesses on defendant's direct case. And so, for  
11 example, Mr. Karam testified to a number of items that were  
12 actually directly contradicted by documentary evidence, such as  
13 GMB submissions, for example, where Mr. Picarella's apparently  
14 not doing his job and there's actually documentary evidence  
15 showing that Mr. Karam was incorrect. That occurs on a certain  
16 number of things. For example, he said Mr. Picarella had  
17 responsibility for surveys when in fact there is documentary  
18 evidence that Mr. Picarella did not get that job until after  
19 the deadline which Mr. Picarella was supposed to have missed  
20 and there is clear evidence on.

21 There are items like that, I think anywhere between 20  
22 and 40 minutes or 20 and 30 minutes; not a lot, but I think  
23 it's important.

24 THE COURT: So let's do this, let's bring the jury  
25 in --

GCDTPIC4

1 MR. HUBBARD: Judge, I'm sorry, I want to clear up one  
2 last thing so we don't interrupt you any more. I had these  
3 mitigation books, the books with his job search. What I would  
4 like to do is to simply move the admission of those  
5 compilations. I don't know if we would be able to use them or  
6 not, but I would like to have them in evidence.

7 THE COURT: My recollection is before you were  
8 speaking to defense counsel about perhaps culling that down  
9 some. Is that happening? I think there were like well over a  
10 thousand documents.

11 MR. BORTNICK: Big notebooks that show -- two big  
12 notebooks. The other thing I could do would be on direct to  
13 show them to him and have him say what's in those books and  
14 have that as part of the testimony and not necessarily put the  
15 books themselves in evidence, but I really do think -- there is  
16 the mitigation instruction, there's a mitigation defense, so I  
17 think that we should be allowed to use it.

18 MR. JACKSON: Your Honor, I don't know if this is the  
19 appropriate time to make this objection, but we don't think any  
20 rebuttal case is appropriate.

21 The subject matter that Mr. Bortnick is talking about  
22 could have been the subject of the cross-examination of  
23 Mr. Karam, and it was not. Moreover, the plaintiffs chose to  
24 call these witnesses in their case. There are no subject  
25 matters that were the subject of testimony that were not either

GCDTPIC4

1 explored in depositions or other aspects of the case. So the  
2 claim of any unfair surprise just doesn't exist in this case.

3 And for them to recall Mr. Picarella, who is a witness  
4 who testified extensively in this case, and they were given an  
5 extensive opportunity to redirect him, I submit, your Honor,  
6 would be highly irregular and would require us to again have an  
7 opportunity to cross him regarding any of those issues and  
8 regarding any potential bias associated with it. It's  
9 unnecessary in the case and it's not appropriate in this  
10 situation where we have a very short, truncated defense case.

11 THE COURT: I will allow the brief rebuttal.

12 What's the defendant's position on the binders for  
13 mitigation?

14 MR. JACKSON: The defendant's position on this is this  
15 is something that was raised on I believe the first day, if not  
16 the first day, the second day of trial, and we haven't heard  
17 word one about it. There hasn't been any attempt to bring it  
18 down, and it wasn't offered in the plaintiff's case. They  
19 could have raised it with us at any point. They rested, it  
20 wasn't introduced, we didn't introduce evidence during the  
21 course of our case on mitigation, so it's not a part of any  
22 appropriate rebuttal case.

23 THE COURT: Okay. I will allow them to introduce the  
24 documents. It was something that plaintiff's counsel wanted to  
25 introduce early on in the case. The reason it wasn't

GCDTPIC4

1 introduced is because defense counsel objected there were too  
2 many documents and you needed a lot of time to go through all  
3 the documents. So whether or not plaintiff's counsel contacted  
4 the defense or not, you certainly had an opportunity to go  
5 through all of those documents. So I will allow them to put  
6 them in. I don't think it's something that would be fair for  
7 me to have deemed waiving them putting this in because  
8 plaintiff's counsel did attempt to introduce this and it wasn't  
9 introduced on the direct case because the defense objected to  
10 the volume of the documents.

11 MR. JACKSON: Your Honor, we respectfully disagree,  
12 because it wasn't the volume, per se, of the documents that was  
13 our issue, it was the fact that this wasn't a document. It  
14 wasn't a voluminous document. If they had sought to introduce  
15 a 2,000-page voluminous document, that would be fine.

16 What this is is a collection of numerous different  
17 types of documents, and it's impossible for us to even -- we  
18 have numerous different types of objections ranging throughout  
19 the federal rules of evidence. It is impossible for us -- they  
20 couldn't take their entire case and make that PX-1 and offer it  
21 in evidence and then we're forced to parse out each part.

22 And I thought that, after our discussion, the  
23 responsibility was on the plaintiffs to come back and at least  
24 break this up into some reasonable portions that we could offer  
25 appropriate objections on and discuss the evidentiary basis for

GCDTPIC4

1 the admission of this of the different parts of it.

2 THE COURT: I would just observe -- I don't know if  
3 you actually expect the jury to go through all of these binders  
4 and all of that other stuff, but if you want to admit that into  
5 evidence, I will let you admit that in evidence. It seems  
6 that's fine if that's what you wish to do with Mr. Picarella on  
7 your rebuttal case.

8 So let's do that. We'll bring the jury in and let's  
9 get going on the testimony. It seems we won't finish this  
10 testimony before lunch, probably; maybe we will, but let's go  
11 ahead and get to it with the witness who is still on the stand.

12 The defendants will rest, the plaintiffs will have a  
13 brief rebuttal case. I believe it's appropriate for me to let  
14 the jury know -- first apologize to the jury for the delay  
15 because they have been here for a while, and then I will also  
16 let the jury know that juror number one is no longer with us,  
17 and they shouldn't speculate as to why that is the case, and  
18 move forward.

19 Is there anything that counsel want to raise about  
20 anything regarding that issue about juror number one?

21 MR. HUBBARD: Not for the plaintiff.

22 MR. JACKSON: No, thank you, your Honor.

23 THE COURT: Okay. Let's bring the jury in.

24 (Continued on next page)

GCDTPIC4

White Carr - cross

1 (Jury present)

2 THE COURT: Welcome back. I hope you had a pleasant  
3 evening. I'm sorry about the delay, I was discussing some  
4 scheduling matters with counsel.

5 As you see, juror number one is no longer with us.  
6 You should not speculate on the reasons for that.

7 We will continue with the case on trial with  
8 plaintiff's counsel's cross-examination of the witness.

9 Go ahead, counsel.

10 MR. HUBBARD: Thank you, your Honor.

11 SUZANNE WHITE CARR,

12 having been previously sworn, testified as follows:

13 CROSS-EXAMINATION

14 BY MR. HUBBARD:

15 Q. Ms. White, good morning.

16 A. Hi.

17 Q. Did you tell us yesterday what your present position is at  
18 HSBC?

19 A. Yes, I did.

20 Q. What is it?

21 A. Chief operating officer for global markets business.

22 Q. Have you been reassigned to a different job?

23 A. Not as of today. I did get promotion recently effective  
24 2nd of January, yes.

25 Q. What position is that?

GCDTPIC4

White Carr - cross

1 A. Chief risk officer for the markets business, banking  
2 business, and the CMB business, our commercial banking  
3 business.

4 Q. That's outside of the investment bank?

5 A. No, it covers that, too, so keeps the coverage I have and  
6 extends it into our businesses.

7 Q. Do you recall on the day before the decision was made to  
8 select Ms. Jenner to succeed Ms. Hedges that you and some of  
9 your colleagues met to discuss who would be chosen to follow  
10 Ms. Hedges?

11 A. There were a number of discussions. I don't recall one  
12 specifically, but there were discussions about who would be  
13 chosen, yes.

14 Q. And there was one meeting that you attended with  
15 Mr. Pizzimbono, right?

16 A. Yes.

17 Q. And you had Ms. Weiss in that meeting, did you not?

18 A. I don't remember if Ms. Weiss was there or not. She was  
19 our HR rep, so she may well have been, but I don't recall.

20 Q. But there were some meetings about what decision should be  
21 made?

22 A. Yes.

23 Q. And the decision was made to select Ms. Jenner to succeed?

24 A. Yes, that's correct.

25 MR. HUBBARD: May we see 132, please.

GCDTPIC4

White Carr - cross

1 Q. I want to ask you about a couple of documents, please.

2 A. Sure.

3 Q. Looks like a note that you wrote on the 11th of September,  
4 and it looks like it's to Ms. Weiss, and you are reporting a  
5 conversation with Mr. Picarella looks like a couple months  
6 earlier, fair enough?

7 A. Yes.

8 Q. And you say: Mike reached out to me to catch up. As you  
9 know, I was aware of the situation between him and Eileen and  
10 was happy to meet with him.

11 Then in the middle of the document: My advice to him  
12 was that he should not feel pressured, and I told him that it  
13 was really not a big deal in any case, it happened a long time  
14 ago, talking about some email. I tried to make him feel  
15 comfortable. And you go on to say that I asked Mike if he  
16 wanted to talk about the issues, and I asked Mike what he  
17 wanted to talk to me about, and I told him I was aware of the  
18 issues that he raised in the investigation.

19 So twice here you indicate in your note that you were  
20 aware of the complaints that Mr. Picarella had made.

21 A. I was aware that he made some complaints about Ms. Hedges,  
22 yes.

23 Q. You were aware?

24 A. That Mr. Picarella had made complaints about Ms. Hedges'  
25 treating him poorly.



GCDTPIC4

White Carr - redirect

1 Q. So were you aware at the time that Mr. Picarella had made  
2 complaints about the way Ms. Hedges had treated Ms. Parker?

3 A. No.

4 Q. You were not?

5 A. I was not, no.

6 Q. When did you learn what the allegations were with respect  
7 to Key Largo?

8 A. Excuse me?

9 Q. When did you learn what the allegations were with respect  
10 to Key Largo?

11 MR. JACKSON: Objection, vague.

12 THE COURT: Overruled, you may answer.

13 A. There was some -- let me think. I'm not sure who made what  
14 allegation about exactly what in Key Largo, to be honest. I  
15 never saw anything specific. So I heard that there was some  
16 incidents down there but I'm not sure if they were part of the  
17 complaints or not or exactly what form they took.

18 Q. Ms. Bilbrey told you, did she not, about the complaints  
19 that Mr. Picarella had made about sexual harassment of  
20 Ms. Parker at that meeting, correct?

21 A. No, she didn't tell me anything about that.

22 MR. HUBBARD: Nothing further from this witness.

23 THE COURT: Okay. Any redirect?

24 MR. JACKSON: Just very quickly, Judge.

25 (Continued on next page)

GCDTPIC4

1 REDIRECT EXAMINATION

2 BY MR. JACKSON:

3 Q. Ms. White, we were looking at PX-132?

4 A. Yes.

5 Q. And you wrote that in September of 2012?

6 A. Yes.

7 Q. What were you doing in between July and September of 2012?

8 A. I got married, and so I was out of the office for a few  
9 weeks, just over three weeks.

10 Q. And you were out during some of that time period between  
11 the end of July when you had the meeting and when you wrote  
12 that note?

13 A. Yeah, I had a visa issue that I had to deal with before I  
14 got married, and then I got married on the 4th of August and  
15 went on honeymoon after that.

16 MR. JACKSON: Ms. White, thank you very much for your  
17 testimony.

18 No further questions, your Honor.

19 THE COURT: Okay, the witness is excused.

20 Defense counsel, do you have another witness?

21 MR. JACKSON: Your Honor, at this time we would like  
22 to offer a stipulation in evidence.

23 THE COURT: Okay. What number is that going to be?

24 MR. JACKSON: Your Honor, this is DX-301. It simply  
25 reads: The parties to the above-captioned action hereby

GCDTPIC4

Picarella - direct

1 stipulate and agree that Mr. Picarella obtained legal counsel  
2 in connection with this matter in December 2012.

3 It is dated December 12, 2016, and signed by the  
4 parties.

5 THE COURT: Okay. Are there any other witnesses?

6 MR. JACKSON: Your Honor, at this time HSBC rests.

7 THE COURT: Okay. Is there any rebuttal case by the  
8 plaintiff?

9 MR. BORTNICK: There is, your Honor.

10 THE COURT: Plaintiffs, you may call your witness.

11 MR. BORTNICK: Call Mr. Picarella.

12 Your Honor, at this time we move introduction of  
13 Plaintiff's Exhibits 301 and 302, which are these binders.

14 THE COURT: Okay. Those are in.

15 (Plaintiffs' Exhibits 301 and 302 received in  
16 evidence)

17 MR. BORTNICK: If I could hand this to the witness,  
18 your Honor.

19 THE COURT: Okay.

20 MICHAEL PICARELLA,

21 having been previously sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. BORTNICK:

24 Q. Mr. Picarella, I'm showing you what has been admitted into  
25 evidence as Plaintiff's Exhibits 300 and 301, those two

GCDTPIC4

Picarella - direct

1 binders. What are they?

2 A. That's a compilation of documents that support my search  
3 for employment since being terminated by HSBC.

4 Q. During some of the testimony from the defendant's witnesses  
5 do you recall there was some discussion by them of what were  
6 called GMB submissions?

7 A. Yes.

8 Q. And do you recall the testimony that you had stopped  
9 preparing those GMB submissions sometimes in March or  
10 April 2014, 2014 time frame, because you wrongly thought they  
11 were no longer needed to be done by London. Do you recall that  
12 testimony?

13 A. Yes.

14 Q. Could we have Plaintiff's Exhibit 240, please.

15 MR. BORTNICK: And if you would highlight the top.

16 Q. What is this again, Mr. Picarella?

17 A. This is a response that I had put together in regards to  
18 the mid-year review that was provided to me by Mr. Karam on  
19 November 21.

20 Q. This was that off-track review, as it has been referred to  
21 here?

22 A. Yes.

23 Q. And the date -- Wednesday, November 26, how did that relate  
24 to Thanksgiving of that year?

25 A. That was the day before Thanksgiving and my last day of

GCDTPIC4

Picarella - direct

1 employment in the building at HSBC.

2 MR. BORTNICK: Could we skip in that to page 5, the  
3 text at the top.

4 Q. Now in this -- by the way, you did send this to somebody at  
5 HSBC?

6 A. I sent it to Mary Bilbrey and copied Mike Karam.

7 Q. Now you write here, with respect to the GMB at the top,  
8 one, Mike Karam -- who was Mr. Karam at the time?

9 A. My boss.

10 Q. Your direct boss?

11 A. Yes.

12 Q. Mike Karam did not provide real examples regarding the  
13 monthly GMB submission, but when I questioned him in the review  
14 Mike stated that you dropped the ball by not sending the  
15 commentary for a few months during the first six months of the  
16 year. This was a false statement.

17 The facts are that I submitted the monthly GMB for  
18 January and February 2014, and London had requested that we  
19 stop providing the monthly GMB submission starting in March  
20 because the format and frequency of the commentaries were being  
21 restructured. I had communicated this to Karam promptly.  
22 Karam was not even aware of the monthly GMB commentary, even  
23 though he assigned the task to me at the end of 2013 and I  
24 copied him on the monthly submission to London (Andrew  
25 Mottram). Did you write that?

GCDTPIC4

Picarella - direct

1 A. I did.

2 Q. Was it accurate when you wrote it?

3 A. It was accurate.

4 Q. Did you support your writing there with anything?

5 A. Yes, I had took screen shots and copied and pasted them  
6 into this document, and they were screen shots of emails  
7 between myself and London and myself and Mr. Karam.

8 Q. Let's look at the first screen shot right underneath the  
9 text.

10 Now what is the date on this?

11 A. It's off to the right there. Assuming it's in March.

12 April 23rd.

13 Q. Okay. And now if we could go back to the text where it  
14 says hi Mike -- dealing with two Mikes, you and Mr. Karam.

15 A. Correct.

16 Q. So this is you, Mike Picarella, writing your boss,  
17 Mr. Karam, right?

18 A. That's right.

19 Q. And you write: Hi, Mike, yes, London recently changed the  
20 monthly process and it is no longer required for me to collect  
21 the U.S. comments.

22 And you notified him in April, right?

23 A. Correct.

24 Q. And then if we can look at the next screen shot, let's look  
25 at the date, what is the date?

GCDTPIC4

Picarella - direct

1 A. April 23rd, I believe the same date.

2 Q. Okay. And that one, who writes this document?

3 A. Well, there's two, the lower --

4 Q. The bottom.

5 A. The bottom half.

6 Q. The lower half of that second document, the from and to.

7 A. Right, Mr. Mottram worked out of our London office. He was  
8 the central repositor for these regional commentaries.

9 Q. And he writes: Hi, Mike, the process has changed for the  
10 coalition of commentary with the GMB commentary being replaced  
11 by the business performance commentary, BPC, request.

12 Was that the change that you were referring to?

13 A. Yes, and he went on to describe it in more detail.

14 Q. Did you have anything to do with the BPC requests?

15 A. No, it was being redirected to the chief financial officer  
16 for each product, and they were going to go a different route  
17 of collecting the commentary each month going forward.

18 Q. Was that task ever assigned to you?

19 A. No.

20 Q. The BPC?

21 A. No.

22 Q. And now if we go to the next screen shot on page 6, if you  
23 can look, there's two emails there. Let's look at the bottom  
24 one first from Michael Karam, it's the top box, the second.

25 Can you read the date there on the right?

GCDTPIC4

Picarella - direct

1 A. Yeah, February 6.

2 Q. And this email is from your boss, Mr. Karam, to you, right?

3 A. Correct.

4 Q. And he writes to you: Mike -- as in Mr. Picarella -- I'm  
5 not familiar with this submission. Any idea to who this is  
6 for? Please CC me on the submission. Thanks.

7 Do you see that?

8 A. Yes, and the subject matter was the GMB submission.

9 Q. That was my question.

10 So he's referring to the GMB submission, and then you  
11 responded in the top half of that to him: Hi, Mike -- as in  
12 Mr. Karam -- the GMB submission is a monthly commentary  
13 provided by each region. It is one the tasks you assigned me  
14 at the end of last September 2013. I will copy you on the  
15 email response today. I believe you are copied on the email  
16 requests that I sent each month.

17 Do you see that?

18 A. Yes.

19 Q. Now let's go to the bottom on the page, and let's look at  
20 the date first on the right, if we can pull that up.

21 What's the date of that?

22 A. March 7.

23 Q. Now let's go to the -- that's fine. Thank you.

24 And what is this email?

25 A. This is the complete February 2014 GMB submission.



GCDTPIC4

Picarella - direct

1 Q. Is that the last one you did?

2 A. I believe so. February or March was the very last one.

3 Q. And who did you CC on that?

4 A. Mr. Karam, my boss.

5 Q. Let's go to the next page, please.

6 The top email there, what's the date of that one?

7 A. February 7, 2014.

8 MR. BORTNICK: If we highlight the top part, the  
9 subject of the email and the people it's addressed to.

10 Q. And what is the subject of this email?

11 A. This is the January GMB monthly submission.

12 Q. Did you prepare that?

13 A. I did.

14 Q. And did you send it to London?

15 A. I did.

16 Q. In accordance with your prior practice?

17 A. Yes.

18 Q. And who did you CC?

19 A. Mr. Karam, my boss.

20 Q. There was also some testimony during defendant's case that  
21 said you were late in making certain Greenwich survey  
22 submissions. Do you recall that?

23 A. Yes, I do.

24 Q. And just so we're all back on the same page, what was  
25 Greenwich survey project?

GCDTPIC4

Picarella - direct

1 A. Each year -- Greenwich Associates is an industry survey,  
2 and we work with them. They're an external third party. And  
3 we work with them throughout the course of the year to collect  
4 information which clients they should go out to interview them  
5 based on our performance, our HSBC performance, so firm  
6 performance, and we get anonymous feedback from Greenwich  
7 periodically on what our clients think we're doing well and  
8 what they think we need to improve on.

9 Q. And what did HSBC need to do in order to be part of the  
10 survey?

11 A. Well, we needed to submit our client survey list to them by  
12 product so they would have a database of clients and contacts  
13 that they would reach out to with questionnaires and collect  
14 the information collate it and give us back themes and basic  
15 feedback.

16 Q. Now the testimony that we heard earlier had to do with your  
17 being late in submitting this information to the Greenwich  
18 survey in late or fall of -- fall or early winter of 2014, is  
19 that correct?

20 A. Right, it was a missed deadline I was accused of.

21 Q. Did you actually, at the time of the deadline, even have  
22 this task assigned to you?

23 A. No, I did not.

24 Q. Had you had it before that time ever?

25 A. Yes, in 2011 and '12 it was my responsibility, but in 2013

GCDTPIC4

Picarella - direct

1 it was not.

2 Q. Was it taken away from you in 2013?

3 A. Yes.

4 Q. If we could go to the same Exhibit, 240, page 8 of 20 at the  
5 top, and if you could highlight the top text.

6 And this is, again, part of your response to the  
7 off-track review?

8 A. Yes, there were three items that Mr. Karam had documented.

9 Q. GMB was one we talked about that?

10 A. GMB, this one, and the give up accounts.

11 Q. And you wrote here at the top: Mr. Karam did not provide  
12 real examples regarding the Greenwich survey, but when I  
13 questioned him he stated that he received complaints about me  
14 from Greenwich that the corporate account lists were late.  
15 This is a false statement. I had then explained the facts to  
16 Mike Karam that the corporate account lists are due in November  
17 each year, and that the Greenwich work was not assigned to me  
18 in November 2013 but instead was assigned to David Garcia at  
19 that time. I also explained the facts to Mike Karam that the  
20 Greenwich work was first assigned to me in December 2013 during  
21 my sudden and without notice 2013 mid-year review held in  
22 December 2013. I also pointed out the facts to Mike Karam that  
23 the first meeting held to discuss my involvement with the  
24 Greenwich survey was following the 2013 mid-year review in  
25 December 2013 with Pablo Pizzimbono, Mike Karam, and myself.

GCDTPIC4

Picarella - direct

1 Was that accurate?

2 A. Yes.

3 Q. Let's look at the first -- did you again, as you did with  
4 the GMB, attach some emails or screen shots supporting what you  
5 said?

6 A. Yes, I did.

7 Q. Are those following that text?

8 A. Yes.

9 Q. Let's look at the first one underneath, and the date is --  
10 what is the date?

11 A. December 10, 2013.

12 Q. And look at the text of the email.

13 It is from whom?

14 A. Mr. Karam to myself.

15 Q. And he writes, if you look in the second line of this, I  
16 would also like to review progress over the business  
17 management's support objectives and Greenwich.

18 Do you see that?

19 A. Yes.

20 Q. What does the Greenwich refer to there?

21 A. The Greenwich Associates survey.

22 Q. So as of this date, did you have -- as of the date  
23 December 10, did you have responsibility for that?

24 A. No, not at that time.

25 Q. If we could go to the next page, page 9. And if you look

GCDTPIC4

Picarella - direct

1 at the top email --

2 MR. BORTNICK: All we need to do is highlight the top  
3 part there, the subject.

4 Q. What was the subject of this email, or what is the -- what  
5 is this document?

6 A. That's a calendar invite between Mr. Karam, myself, and  
7 Mr. Pizzimbono regarding the Greenwich survey and engagement  
8 strategy moving forward.

9 Q. Did you send this or did someone send it to you?

10 A. I believe that was sent by Mr. Karam.

11 Q. And when did he send it, what date?

12 A. December 11, 2013.

13 Q. So was it on or after that date where you assumed the role  
14 again of doing the Greenwich survey?

15 A. Yeah, we had that meeting and there were a few agenda  
16 items, from that point going forward I assumed the  
17 responsibility.

18 Q. If we could go to the next page 10, and I want you to look  
19 at the bottom email there, the bottom. Could we get a date on  
20 that?

21 A. Yeah, looks to be December 2nd, 2013.

22 Q. And who was this from?

23 A. It is from Zach Lungo, senior manager at Greenwich  
24 Associates.

25 Q. Who is it addressed to?

GCDTPIC4

Picarella - direct

1 A. Carol Jenner and Michael Karam.

2 Q. If you look at the second paragraph, can you read that out  
3 loud?

4 A. It's not so clear, but I will try. As a reminder, we have  
5 normally moved -- think that's normally -- moved past the  
6 corporate --

7 Q. Shall I read it? As a reminder, we have formally moved  
8 past the deadline for input November 25.

9 Do you see that?

10 A. Yes, I do.

11 Q. So what was the deadline for the submission that you were  
12 supposed to have made?

13 A. November 25th.

14 Q. On November 25th whose responsibility was this?

15 A. Carol Jenner.

16 Q. If we can turn to the next page, page 11.

17 MR. BORTNICK: Now highlight the top text portion,  
18 please.

19 Q. You recall there was some testimony about the give up  
20 accounts?

21 A. Yes.

22 Q. And did you also respond in this document --

23 A. I did.

24 Q. -- to what really occurred there?

25 A. Yes.

GCDTPIC4

Picarella - direct

1 Q. And does the text there accurately describe what occurred?

2 A. Yes.

3 Q. Is the testimony that you heard in the courtroom accurate  
4 about the give up accounts?

5 A. By Mr. Karam, no.

6 MR. BORTNICK: You can take that down.

7 Q. There was some testimony from Mr. Karam, and there was an  
8 exhibit in which Mr. Karam wanted you to take the lead at a  
9 particular meeting. Do you recall that?

10 A. Yes, I do.

11 Q. And you had written in the email in that exhibit that you  
12 had assumed that you were at the meeting to provide something  
13 along the lines of commentary and color or words to that  
14 effect, was that correct?

15 A. Yes, I was looking for clarity to what my role would be in  
16 that meeting, whether I would take the lead or add color and  
17 answer questions.

18 Q. And Mr. Karam suggested -- did Mr. Karam suggest that you  
19 were supposed to take the lead at that meeting?

20 MR. JACKSON: Your Honor, at this point objection,  
21 leading.

22 Q. Why don't you --

23 THE COURT: Please rephrase the question.

24 MR. BORTNICK: Could we have Defendant's Exhibit 228.  
25 Can we go to -- just the top, the from, the to. Keep going

GCDTPIC4

Picarella - direct

1 down.

2 Q. That's what you wrote to Mr. Karam, that you assumed  
3 Pablo --

4 That's Mr. Pizzimbono?

5 A. Yes.

6 Q. -- will address certain issues, and you're there for color  
7 and answer any questions, right?

8 A. Yeah, I was just making sure of what the expectations of my  
9 role were going to be in that meeting.

10 Q. Would you normally be expected to lead this meeting?

11 A. No, that was Mr. Pizzimbono's weekly sales manager meeting  
12 and he led every one of those meetings.

13 Q. Was there anything different about this meeting than any of  
14 the other weekly meetings?

15 A. No.

16 Q. There was testimony that in or around August 13 that you  
17 had wrongly thought you had been stripped of your new client  
18 relationship duties, and Mr. Karam said that was incorrect. Do  
19 you recall the testimony?

20 A. I recall.

21 Q. Was it correct or was it incorrect?

22 A. His testimony was incorrect.

23 Q. Why?

24 A. The responsibility for client on-boarding and exiting had  
25 been assumed by Ms. Jenner in the April 2013 time frame. And



GCDTPIC4

Picarella - direct

1 then in May, when Mr. Karam assumed responsibility for managing  
2 me, he had sent out a mail to a large audience that stated that  
3 Mr. Pizzimbono would be handling the prioritization and  
4 on-boarding of new clients, Mr. Karam would handle the exiting  
5 of clients, and that a gentleman by the name of James Long, who  
6 works for -- worked for Suzy White, would be collecting the  
7 business cases for new clients and logging them in a  
8 spreadsheet.

9 Q. Did you ever have that responsibility at one time?

10 A. Yes, I did.

11 Q. When did you last have that?

12 A. The last time I had it was in April, but that was one of my  
13 significant job responsibilities from the first day I joined  
14 the firm.

15 Q. Mr. Karam testified that he filed a human resources  
16 complaint against you. Do you recall that testimony?

17 A. I recall.

18 Q. And he said the subject of that complaint was that he  
19 believed or at least suspected that you had told the New York  
20 Post about your off-track review, and that information in that  
21 regard was published in the New York Post article. Do you  
22 recall that?

23 A. I recall.

24 Q. Did you ever in any way, directly or indirectly, tell the  
25 New York Post about that off-track review meeting?

GCDTPIC4

Picarella - direct

1 A. Absolutely not.

2 Q. What was your reaction -- did you see the article at some  
3 point?

4 A. I did, yes.

5 Q. What was your reaction to the article?

6 A. I was embarrassed, humiliated that my personal affairs at  
7 work were now in the newspaper.

8 Q. Could we have Plaintiff's Exhibit 104, please.

9 MR. BORTNICK: 104 is not in evidence.

10 THE COURT: Any objection to 104?

11 MR. JACKSON: Outside of the scope of an appropriate  
12 rebuttal case.

13 MR. BORTNICK: Your Honor, may I do it this way, and I  
14 think the objection may be ameliorated.

15 THE COURT: Go ahead.

16 BY MR. BORTNICK:

17 Q. Ms. Malanga testified, and do you recall her saying that  
18 you were not excluded from Mr. Pizzimbono's -- certain of  
19 Mr. Pizzimbono's meetings because they had been discontinued?

20 MR. JACKSON: Objection, your Honor.

21 THE COURT: Please rephrase the question.

22 Q. Was there any testimony from Ms. Malanga concerning  
23 Mr. Pizzimbono's internal circle meetings?

24 A. Yes.

25 Q. And do you recall what that testimony was?

GCDTPIC4

Picarella - direct

1 MR. JACKSON: Objection, your Honor.

2 THE COURT: Okay. Let me see counsel in the robing  
3 room, and we'll bring the court reporter.

4 (In robing room)

5 THE COURT: Okay. What's the objection?

6 MR. JACKSON: Two bases, your Honor. First, I didn't  
7 object because I wanted us to proceed efficiently with regard  
8 to the first set of questions, but there are numerous cases  
9 saying it's improper to ask a witness to comment on the  
10 testimony of other witnesses.

11 The second basis is we're now getting into a second  
12 witness, and if the intention of this redirect testimony is to  
13 to go through every witness in the case and to ask them to --  
14 to ask Mr. Picarella to go subject by subject and explain why  
15 they were false, I just think that that's an improper use of  
16 rebuttal case. It's not appropriate.

17 THE COURT: Okay. Where are we going with this?

18 MR. BORTNICK: We didn't call Malanga, but what she  
19 testified to is that Mr. Picarella had made a complaint that he  
20 was excluded from certain meetings, and the reason was he  
21 wasn't excluded but they had been discontinued when in fact --  
22 and that's what PX-104 was going to, is that in fact the  
23 meetings had been reinstated back around the end of May of  
24 2012, and that all the prior attendees would be part of that  
25 meeting except for Mr. Picarella and Ms. Parker. So the jury

GCDTPIC4

Picarella - direct

1 is left with this impression in the testimony that these  
2 meetings stopped, that's why he wasn't there, when in fact they  
3 restarted and he was excluded.

4 THE COURT: Okay.

5 MR. JACKSON: This is the whole point of  
6 cross-examination, your Honor, you are allowed to cross-examine  
7 on any of these subjects. You're not allowed to recall the  
8 plaintiff in order to present additional evidence in an attempt  
9 to impeach each one of these witnesses. At this point it's --

10 THE COURT: What is 104?

11 MR. BORTNICK: Malanga is not on it, your Honor.

12 (Pause)

13 THE COURT: Back up for me again, I thought this --  
14 what was this about? I thought it was about what Pizzimbono is  
15 talking about.

16 MR. BORTNICK: It is. This is a chat between  
17 Ms. Murray and Ms. Hedges in which Ms. Murray is reporting that  
18 the weekly month meeting is now both reinstated, same time as  
19 before, but now it's just the certain people listed, and it's  
20 Mr. Pizzimbono's meeting, which is the reference to him. In  
21 other words, the meeting has been reinstated, it's Pizzimbono,  
22 it's Murray, it is Ms. Hedges and one other, but Mr. Picarella  
23 and Ms. Parker, who used to be in the meetings, are no longer  
24 in them.

25 THE COURT: And what is it that you plan on doing with

GCDTPIC4

Picarella - direct

1 him regarding that?

2 MR. BORTNICK: I wanted to ask him about this because  
3 it shows the meeting has been reinstated.

4 THE COURT: How does he know that, because he looked  
5 at it in discovery?

6 MR. BORTNICK: Yes, because he saw it and he knows who  
7 the people are and he is competent to interpret what this chat  
8 means.

9 THE COURT: But does he know from firsthand knowledge  
10 whether or not these meetings were reinstated?

11 MR. BORTNICK: That's what he testified to earlier,  
12 that yes, they -- he said that there were the meetings, he  
13 didn't talk about them -- my recollection of his testimony was  
14 not they existed and they stopped and restarted, his testimony  
15 was: I made a complaint that at a time they were being held I  
16 was excluded.

17 THE COURT: What is Malanga's testimony on this point?

18 MR. BORTNICK: Malanga's testimony is no, you're not  
19 being exclude, Mr. Picarella, because the meetings have been  
20 discontinued and were discontinued some time ago.

21 THE COURT: And --

22 MR. BORTNICK: This shows that they were --

23 THE COURT: They weren't discontinued. But what was  
24 her testimony in of terms of time?

25 MR. BORTNICK: I believe this was the September 2012

GCDTPIC4

Picarella - direct

1 time frame is her time frame. Yes, September 2012, that was  
2 her time frame.

3 THE COURT: She said in September 2012 the meetings  
4 were discontinued?

5 MR. BORTNICK: Yes.

6 THE COURT: And that's why he was excluded?

7 MR. BORTNICK: Right.

8 THE COURT: And this shows what?

9 MR. BORTNICK: In May they were reinstated. She said  
10 they had been discontinued. I don't recall if she ever said  
11 when in her testimony.

12 THE COURT: So why is that proper rebuttal? I don't  
13 understand what is it you're doing.

14 MR. BORTNICK: She's saying the meetings didn't exist  
15 in September. They did. They were reinstated in May of that  
16 year.

17 THE COURT: And these were whose meetings?

18 MR. BORTNICK: Mr. Pizzimbono's meetings, weekly  
19 meetings.

20 THE COURT: How do we know that from this document?

21 MR. BORTNICK: First I expect him to testify the  
22 weekly admin meeting is the same as Mr. Pizzimbono's inner  
23 circle meeting, and the "him," therefore, has to be  
24 Mr. Pizzimbono.

25 THE COURT: So break this down for me. His testimony

GCDTPIC4

Picarella - direct

1 is going to be what? You want to show him this document and  
2 have him say what, have him say, looking at this document, this  
3 must be what this is referring to?

4 MR. BORTNICK: Do you know what it refers to? And I  
5 expect he will say yes. And I will say: How do you know? And  
6 I expect him to say: Because it refers to the weekly  
7 administrative meeting. And did that meeting have another  
8 name? I expect him to give the answer of: The inner circle  
9 meeting. And then I will ask him: What does this document  
10 show about that meeting?

11 THE COURT: What's defendant's position on that?

12 MR. JACKSON: He has zero personal knowledge of this  
13 communication, what it's about. It's pure speculation about a  
14 conversation he didn't participate in. It this should have  
15 been the subject of cross-examination of Mr. Pizzimbono if they  
16 thought it was appropriate. It's just not.

17 THE COURT: Why didn't you ask Pizzimbono about this,  
18 or Malanga's testimony, why didn't you confront her on this?

19 MR. BORTNICK: Malanga is not on this.

20 THE COURT: Neither is Picarella.

21 MR. BORTNICK: No, but this is the kind of thing that  
22 he would be familiar with what he was referring to. I could  
23 have asked Malanga, but I don't think I would have gone any  
24 where, and Mr. Pizzimbono. The witnesses here, seems to me, is  
25 the one that would know most about what this means.

GCDTPIC4

Picarella - direct

1 THE COURT: And did -- let me see this again.

2 Did Hedges testify about any of this?

3 MR. BORTNICK: She didn't testify.

4 THE COURT: She didn't testify at all.

5 MR. BORTNICK: None of the other witnesses are here in  
6 this trial.

7 MR. JACKSON: By the way, your Honor, Ms. Hedges was  
8 on their witness list. They could have called Ms. Hedges if  
9 they thought this was something that was important. They chose  
10 not to call Ms. Hedges.

11 THE COURT: How does this talk about -- who is MJ on  
12 this?

13 MR. BORTNICK: That is Mary Jo -- blanking on her last  
14 name. Mary Jo Rogers.

15 MR. HUBBARD: I think that was Mr. Pizzimbono's  
16 secretary.

17 THE COURT: And you're saying this refers to a meeting  
18 that -- who is usually at this weekly meeting?

19 MR. BORTNICK: Those same people that are identified  
20 here in the chat, plus Mr. Picarella and Ms. Parker. And now  
21 with the reinstatement of the meeting, at least as far as we're  
22 concerned, Mr. Picarella is no longer part of the meeting.  
23 That's what he is complaining about being excluded from.

24 THE COURT: According to that, neither is Mr. Parker  
25 or Mr. Pizzimbono.



GCDTPIC4

Picarella - direct

1 MR. BORTNICK: It's Mr. Pizzimbono's meeting. That's  
2 what the weekly admin meeting is.

3 THE COURT: Who is this Margaret Murray person?

4 MR. BORTNICK: She's one of the people that is  
5 normally at this meeting.

6 Your Honor, we'll withdraw it.

7 THE COURT: But it says here Murray says just you, me  
8 and MJ.

9 MR. BORTNICK: But then it goes a little further down,  
10 but we'll withdraw it and make it easy.

11 THE COURT: How much more do you have?

12 MR. BORTNICK: Two more questions, actually. Two  
13 questions.

14 THE COURT: Okay.

15 (Continued on next page)

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GCDTPIC4

Picarella - direct

1 (In open court)

2 THE COURT: That objection is sustained.

3 BY MR. BORTNICK:

4 Q. Mr. Picarella, earlier during defense's case there was a  
5 picture, demonstrative exhibit of a dark conference room. Was  
6 that an accurate depiction -- well, were there times when you  
7 went to a conference room to make personal calls?

8 A. Yes.

9 Q. How often?

10 A. Couple times a day. Generally you were not allowed to use  
11 your personal cell phone on the trading floor, so people would  
12 go into conference rooms regularly. I did it as often as  
13 anybody else would.

14 Q. Was the practice limited to you?

15 A. No, it was to everybody.

16 Q. The picture that we saw up there of that dark room, is that  
17 an accurate depiction of the room you would typically make  
18 these phone calls from?

19 A. That was not a typical conference room on the trading  
20 floor.

21 Q. What did they look like typically?

22 A. They were on the perimeter of the trading floor. And the  
23 outer wall of these rooms, these conference rooms and offices,  
24 were glass from floor to ceiling. So your conference room was  
25 basically all glass, and during business hours, daylight hours,

GCDTPIC4

Picarella - cross

1 it was so bright in those rooms most of the time you didn't  
2 need to turn a light on.

3 Q. I have one question for you. Is it conceivable to you that  
4 Mr. Karam, your direct boss, did not know that you were  
5 suspended from work from January 15 through almost the end of  
6 March when you were terminated?

7 MR. JACKSON: Objection.

8 THE COURT: Sustained.

9 MR. BORTNICK: No further questions.

10 THE COURT: Okay, any cross-examination?

11 MR. JACKSON: Your Honor may I retrieve the books that  
12 were offered into evidence?

13 THE COURT: Yes.

14 CROSS-EXAMINATION

15 BY MR. JACKSON:

16 Q. Mr. Picarella, the document that we were looking at earlier  
17 was your response to your review?

18 A. Yes, where I had three responses to three subjects that  
19 were discussed in my review.

20 Q. So you wrote that up. You wrote that, right?

21 A. I wrote that in the office. The review was I believe on  
22 Friday, November 21st, and the remaining days I had in the  
23 office until the 26th I put that together.

24 Q. I want to be clear, that's a document that we were looking  
25 at that you wrote, correct?

GCDTPIC4

Picarella - cross

1 A. I wrote every part of that.

2 Q. And you said you wrote that in the office, correct?

3 A. Correct.

4 Q. So you spent several hours during the workday crafting your  
5 response to the review that you had gotten from your  
6 supervisor, correct?

7 A. Yeah, I don't know how long it took me to put that  
8 together, but I put it together while I was in the office at my  
9 desk.

10 Q. And it took you several hours, correct?

11 A. I don't know. I don't know how long it took me to put it  
12 together. Not that long, because I had the information readily  
13 available. I knew the facts and how things took place and they  
14 were different from how Mr. Karam was portraying them.

15 Q. Now, sir, the vast majority of the documents in these two  
16 binders related to your job search, these are just online  
17 applications, right, that you clicked on something?

18 A. No, it's a combination of things. Some of it is online  
19 applications, some of it is receipts from online applications,  
20 some of it is emailed correspondence with colleagues -- former  
21 colleagues, I should say. Some of it might be some LinkedIn  
22 chat messages. I tried to preserve everything I could in my  
23 job search and provide that to yourself -- my counsel and  
24 yourself.

25 (Continued on next page)

GCD9PIC4

Picarella - cross

1 Q. I see. So some of this is LinkedIn messages, LinkedIn  
2 applications?

3 A. There may be some LinkedIn -- I know I was subscribed to  
4 LinkedIn jobs. There might be some LinkedIn job applications  
5 in there. But some of it was correspondence with headhunters  
6 and other colleagues that I had been connected through on  
7 LinkedIn.

8 Q. So it's e-mails, LinkedIn applications, online  
9 applications, right?

10 A. Yeah. And maybe some other forms of communication.

11 Q. I see. Okay.

12 Now, when you were describing a moment ago that you  
13 drafted this response, this is in 2014 that you drafted this  
14 response, right?

15 A. Yeah. It was within the three days after my review.

16 Q. And this is during the time period that you were spending  
17 90 percent of your workday not working, correct?

18 A. Well I had only been assigned work that allowed me to work  
19 ten percent of my workday.

20 Q. I just want to know: I'm correct that this was during the  
21 time period when you were spending 90 percent of your workday  
22 not working, correct?

23 A. Only because ten percent --

24 THE COURT: This is, again, this is a yes-or-no  
25 question. If you can answer yes or no, answer yes or no.

GCD9PIC4

Picarella - cross

1 THE WITNESS: Yeah. That's an estimate. Yes.

2 Q. And during that 90 percent, much of the time you were  
3 surfing personal websites, right?

4 A. I wouldn't say personal websites. I mean I was reading  
5 industry news. I would be researching a lot of research on  
6 various topics. I can't recall how I spent most of the time on  
7 the internet.

8 Q. Okay. You can't recall how you spent most of the time on  
9 the internet. That's what you just said, right?

10 A. Yeah, I mean --

11 Q. I'm just asking, yes or no, that's what you just said,  
12 correct?

13 A. Yeah, going back a couple years I can't remember all the  
14 topics that I would research.

15 Q. Okay. All right. Now, you talked a little bit about  
16 Mr. Karam during your brief testimony just a second ago,  
17 correct?

18 A. Yes.

19 Q. And he was one of your -- he was your last direct  
20 supervisor, correct?

21 A. Correct.

22 Q. And you had problems with Mr. Karam, right?

23 A. I had complaints that I had made.

24 Q. You had problems with Mr. Karam, correct?

25 A. I didn't have problems with him personally. There were

GCD9PIC4

Picarella - cross

1 some times in the way he treated me I had problems with his  
2 behavior.

3 THE COURT: Okay. Hold on. Hold on. Again, these  
4 are designed to be yes-or-no questions.

5 A. I don't know how to define problem. Can you define problem  
6 for me?

7 Q. If you can't define problem, that's fine.

8 You had problems in your relationship with Ms. Jenner  
9 too, right?

10 A. No. I don't believe so.

11 Q. You don't think there were any problems at all in your  
12 relationship with Ms. Jenner?

13 A. I don't believe so.

14 Q. You had problems with your relationship -- in your  
15 relationship with Suzy White professionally, right?

16 A. No. I mean I generally liked Suzy White but I believe  
17 that -- no. I don't believe I had problems with Suzy White.

18 Q. No problems at all?

19 A. No. Some of the behaviors, yes. But I didn't have  
20 problems with her personally.

21 Q. Okay. Well you had problems with Ms. Hedges before any  
22 retaliation, correct?

23 A. Well define problems, please.

24 Q. I'm just asking if you had any problems with Ms. Hedges  
25 before there was any retaliation before you made your

GCD9PIC4

Picarella - cross

1 complaints?

2 A. No. I generally liked Ms. Hedges. I didn't like her  
3 behavior.

4 Q. Okay. All right. But all of these people -- all of your  
5 supervisors had criticisms of the way that you were performing  
6 your job throughout the time that you were at HSBC, correct?

7 A. (No response).

8 Q. That's a yes-or-no answer.

9 A. No. I had received constructive criticism in the reviews  
10 but generally I was not receiving criticism from them prior  
11 to -- can you repeat the question, please.

12 Q. Let me repeat it. And if you can't answer this yes or no  
13 just tell me. All of your supervisors at HSBC had criticisms  
14 of the work that you were doing at HSBC, correct?

15 A. Not while I was working there. I heard the criticisms  
16 here. But not while I was at work.

17 Q. Okay.

18 MR. JACKSON: May I have one moment, your Honor?

19 THE COURT: Yes.

20 MR. JACKSON: Can we look at DX-251 briefly.

21 Could we zoom in on the top part. That's good.

22 Q. Now this is an e-mail from Mr. Karam to you on February 24,  
23 2014, correct?

24 A. Correct.

25 Q. And what he says in the first line of this e-mail is:



GCD9PIC4

Picarella - cross

1 Mike, I'm glad you have finally made contact with Greenwich but  
2 two months have lapsed since this was handed over to you. I've  
3 highlighted a timeline of events.

4 That's what he wrote to you, correct?

5 A. Well he wrote that, yes.

6 Q. And this is an e-mail that you received, correct?

7 A. Yes.

8 MR. JACKSON: Can you take that down.

9 Can we just look at PX-240 briefly at page three.

10 Could you make that a little bigger?

11 Q. This is another portion that you wrote of this document,  
12 right?

13 A. Yes.

14 Q. And what you wrote at the top in part one here on page  
15 three is: Mike Karam did provide clear examples of where I  
16 failed on the three objectives he mentioned in the document.  
17 But Mike -- that's what he wrote, right?

18 A. No. I wrote that.

19 Q. That's what you wrote but you were talking about -- this is  
20 something that you wrote about your conversation with  
21 Mr. Karam, right?

22 A. That was a typo though, because I meant to say did not,  
23 because in each of the three sections I said he did not provide  
24 clear examples. That -- looking back at it, that was a typo.

25 Q. I see. So it's your testimony you spent several hours

GCD9PIC4

Picarella - cross

1 putting this together, right?

2 A. No. I wouldn't say it took me several hours. Again, I  
3 don't know how long it took me. But I worked on these items.  
4 The information -- he provided very little information in the  
5 meeting. In my mind, I knew exactly how these things took  
6 place. For me to put this document together did not take long.  
7 Maybe a couple hours over a course of, you know, two or three  
8 days after the review.

9 Q. So it's your testimony that it was a typo and it should  
10 have said Mike Karam did not provide clear?

11 A. Right. Because I validate that in each of the three  
12 sections you'll see I say Mike Karam did not provide.

13 Q. Okay.

14 A. Details. Examples.

15 Q. All right.

16 A. You can reconcile it.

17 THE COURT: Hold on. There's not a question before  
18 you.

19 THE WITNESS: I'm sorry.

20 Q. Mr. Picarella, just to be clear, you accept that you were  
21 free to call any witnesses you wanted to this case, right?

22 MR. HUBBARD: Objection, your Honor.

23 MR. BORTNICK: Objection.

24 THE COURT: Sustained.

25 Q. Mr. Picarella, you will agree, right, that after you made

GCD9PIC4

Picarella - cross

1 your complaints HSBC continued to provide you with a job for  
2 years, correct?

3 A. Which complaints?

4 Q. The complaints that relate to this case.

5 A. Well there's many. As an example of the complaints --

6 Q. No. No. I'm just asking you: Yes or no, do you agree  
7 with me that after you made the complaints that relate to this  
8 case HSBC continued to provide you employment for years?

9 MR. BORTNICK: Objection, your Honor.

10 THE COURT: Overruled.

11 THE WITNESS: Which complaints? I mean the initial  
12 complaints? My complaint to Mr. Mullen in November 2011? My  
13 complaints to HR? My complaints that Mr. Karam --

14 THE COURT: Hold on, hold on, okay.

15 MR. JACKSON: Your Honor.

16 THE COURT: It was requesting a yes-or-no answer.

17 Go ahead. Do you want to rephrase the question,  
18 counsel.

19 MR. JACKSON: Yes, your Honor.

20 BY MR. JACKSON:

21 Q. Let's focus on your initial complaint. After you made your  
22 initial complaint that relates to this case about the alleged  
23 mistreatment of Ms. Parker you continued to work at HSBC for  
24 years?

25 A. After my initial complaint to HR --

GCD9PIC4

Picarella - cross

1 THE COURT: Hold on. That's a yes-or-no question if  
2 you can answer it yes or no.

3 THE WITNESS: Okay. Let me just think of the  
4 timeframe.

5 Yes.

6 MR. JACKSON: I have no further questions for this  
7 witness, your Honor.

8 THE COURT: Okay.

9 MR. BORTNICK: Nothing, your Honor.

10 THE COURT: Okay. The witness is excused.

11 (Witness excused)

12 THE COURT: Does plaintiff's counsel have any other  
13 witnesses?

14 MR. BORTNICK: We do not, your Honor.

15 THE COURT: Okay. Plaintiff rests?

16 MR. BORTNICK: Yes, your Honor.

17 THE COURT: Okay. Members of the Jury, let's do this.  
18 We're going to take a break while I discuss some scheduling  
19 matters with counsel. Don't discuss the case amongst  
20 yourselves or with anyone else. I'll see you in 20 minutes.

21 (Jury excused)

22 (Continued on next page)

GCD9PIC4

Picarella - cross

1 (In open court)

2 THE COURT: Let's talk about scheduling here. Let me  
3 get an updated estimate from each counsel as to what they think  
4 the approximate length of their summation will be starting with  
5 plaintiff's counsel.

6 MR. HUBBARD: Well your Honor my argument is a  
7 responsive argument. I just said yesterday I thought 75  
8 minutes. If my brother argues for two hours I may have to  
9 change.

10 THE COURT: Defense counsel.

11 MR. JACKSON: At this point, your Honor, I'm  
12 anticipating 90 minutes but I would just ask for a little bit  
13 of flexibility because I am -- I'm anticipating argument since  
14 I have to go first, but I anticipate I'll be able to get my  
15 estimate from yesterday down to 90 minutes.

16 THE COURT: So here are the possibilities. Going to  
17 need to break for lunch. I don't generally prefer to have the  
18 summations and the jury instructions on different days. I  
19 certainly don't want to unnecessarily break up the summations  
20 into different days. So even though I had certainly hoped to  
21 get to the summations and the charge today, what I am currently  
22 considering is perhaps letting this jury go home early today  
23 and then bright and early, 9:30 tomorrow, have summations which  
24 will probably take the morning and then I will give them the  
25 instructions after lunch. But, let me hear from counsel.

GCD9PIC4

Picarella - cross

1 MR. HUBBARD: That is by far my preference, your  
2 Honor. I think it would get -- allow the arguments and the  
3 instructions to come together and give us time to get them done  
4 in an efficient way. There are some things that have happened  
5 this morning. We've been working on the instructions. So it  
6 gives us a chance as counsel to understand what the final  
7 instruction is. And so I would prefer that -- I would prefer  
8 that plan, your Honor.

9 THE COURT: Defense counsel.

10 MR. JACKSON: Your Honor, that's not our preference.  
11 We think it would be much more fair to the jury, they've come  
12 everyday, to give them a full day. And we've truncated our  
13 summation. If we have 90 minutes and 75 minutes, if we take a  
14 brief break in between, there should still be sufficient time  
15 if we do lunch just a little bit earlier, there should be  
16 plenty of time for us to be finished including the charge by  
17 5 o'clock.

18 THE COURT: No. It's going to take some time to read  
19 the charge. We also would probably need to -- and while I'm  
20 sure that both counsel will be absolutely captivating in their  
21 closing arguments the jury is probably going to need a break  
22 between hour-and-a-half-long summations from either side.

23 So, I don't think it's going to be feasible to get  
24 the -- both summations and the charge done today. I think it's  
25 certainly possible to perhaps get both summations done. But it

GCD9PIC4

Picarella - cross

1 may make sense, unfortunately, I don't think the jury will  
2 object to going home early. That way we don't break for lunch,  
3 we just send them home and have them start 9:30. There  
4 shouldn't be any reason for any delay tomorrow. And we go  
5 right into summations and they get the charge, then the case is  
6 theirs. So I think that's what I'm inclined to do because I  
7 just don't think realistically we're going to be able to get  
8 all of that done. But I'll hear further from counsel if you  
9 have any other things you want to add to try to persuade me  
10 differently.

11 MR. JACKSON: Judge, I think the -- if we start at say  
12 1 o'clock, if we let the jury -- if we let the jury go for  
13 lunch. We tell them communicate to them now they can go for  
14 lunch. We come back at 1 o'clock. I'll be done by 2:30. We  
15 can take a brief break. Mr. Hubbard will be done by, if we  
16 take a five, ten-minute break after mine, Mr. Hubbard will be  
17 done by four o'clock. And that still preserves an hour for --  
18 that still preserves an hour for the Court to do the charge.  
19 And I think that the jurors will really appreciate it if we  
20 make use of their time and try to complete the day. Even if,  
21 you know -- I think it would be appropriate to ask the jury --  
22 to tell the jury look, we think that we can complete the case  
23 if you're willing to stay and ask if they'd be willing to, if  
24 the charge goes a bit beyond five, if they'd be willing to stay  
25 a few minutes past so that it can be completed, give them the

GCD9PIC4

Picarella - cross

1 option of that. But I also don't think, your Honor, that this  
2 is a case where if we reach the late part of the day and we  
3 needed to give the charge tomorrow, I don't think that there  
4 would be any prejudice. And I really think that we should ask  
5 the jurors. But, for them to get -- for us to complete the  
6 summations today and for us to have the charge tomorrow and  
7 then to have a full day of deliberations I think will be much  
8 more fairer to the jurors than sending them home after only  
9 hearing essentially what amounts to about 30 minutes of  
10 testimony.

11 THE COURT: I understand. I am concerned, again,  
12 though about -- and defense counsel's suggestion that we give  
13 the jurors a lunch break until one. They're on their other  
14 break until about 12:22. That only gives them 38 minutes for  
15 lunch. That makes it seem as if defense counsel is in the  
16 category of people who lose fifteen pounds on trial. Maybe you  
17 don't eat. These jurors are probably going to need more time  
18 to get food if they haven't brought some lunch with them.

19 Let me hear from plaintiff's counsel.

20 MR. HUBBARD: Your Honor, I think the schedule the  
21 Court proposes is far better. It's going to take longer than  
22 we think it is to get these summations done, to get a break for  
23 the jury in between, and it just doesn't -- these are important  
24 things for the jury and they're going to be worn out by the end  
25 of the day and so I think it would be better if we could argue



GCD9PIC4

Picarella - cross

1 to the jury straight out in the morning and get instructed and  
2 then the case is concluded. That would seem to me to be a much  
3 better procedure, particularly for the court, for us, and for  
4 the jury.

5 THE COURT: I tend to agree with plaintiff's counsel.  
6 Again, I think it certainly would be appropriate to say to the  
7 jury that the evidence is in and that tomorrow morning we will  
8 be proceeding with summations so that they know they're coming  
9 back and that the case is coming to an end. They know that  
10 they're going to come back and get summations and then get my  
11 instructions on the law.

12 My hope would be that tomorrow what we can do is start  
13 promptly at 9:30. Hopefully defense counsel's argument won't  
14 last much longer than 90 minutes, take a break at around 11  
15 o'clock to 11:15, have plaintiff's counsel's summation and then  
16 we see where we are. Maybe, I could try to instruct the jury  
17 prior to lunch and we order lunch for them ahead of time and  
18 have their lunch waiting for them so they can take kind of a  
19 late lunch. But we'll see where we are.

20 So I believe that's what I'm inclined to do. I will  
21 give defense counsel another shot at it. It seems to me that  
22 that's what makes the most sense because I think that --

23 MR. JACKSON: Judge, I appreciate that. And I don't  
24 mean to belabor the point. I have tremendous respect for the  
25 judgment of the Court, as the Court knows. The only thing I

GCD9PIC4

Picarella - cross

1 would ask is can we at least ask the jurors what their  
2 preference is on this? If they want to go home today or if  
3 they want to use the remainder of the day. I just think that,  
4 you know, these are working jurors. They clearly I think have  
5 been very attentive and patient with the case and I just feel  
6 like it is a -- I personally feel like it's not a respectful  
7 use of their time to only have them come in during the day to  
8 only have them hear, you know, 30, 40 minutes of testimony. If  
9 they're fine going home, I think that that would be -- that  
10 would be fine. But I'd hate to have them, to develop a sense  
11 of lack of respect for the process because of them thinking  
12 that we're not efficiently using their time.

13 THE COURT: Again, I don't want to -- we have some  
14 jurors who have other obligations, childcare obligations and  
15 the like, and which they've certainly appreciated the days that  
16 we've broken early. This will be a day that we break extremely  
17 early. I don't want to keep the court reporters and the other  
18 court personnel here after five o'clock either. I don't really  
19 want to do that. So I am going to tell the jury that they're  
20 going home today. They'll get the case tomorrow. We'll have  
21 summations. I will give them the instructions on the law  
22 tomorrow. And my hope is that with some more time to think  
23 about the summations that it's sort of reminiscent of the Mark  
24 Twain quote that, "I would have written you a shorter letter  
25 but I didn't have enough time," but now that counsel has more

GCD9PIC4

Picarella - cross

1 time, perhaps the summations won't be quite as lengthy and  
2 maybe counsel won't be quite as verbose as counsel anticipates  
3 they might be and maybe we can move things along a little bit  
4 better.

5 So I will bring the jury back in and I'll let them  
6 know that we're done for the day. And I'll tell them not to  
7 talk about the case.

8 Did counsel want me to give them any extra special  
9 instructions in terms of press coverage or anything today or  
10 no?

11 MR. HUBBARD: No, your Honor, for the plaintiff.

12 THE COURT: And defense counsel?

13 MR. JACKSON: No. Thank you, your Honor.

14 THE COURT: And I will -- I had planned on letting the  
15 jury know that tomorrow morning they should be here at 9:30 and  
16 we will proceed with closing arguments by counsel and then I  
17 will give them the instructions on the law and then they can  
18 start their deliberations. Any objection to that by counsel  
19 from either side?

20 MR. HUBBARD: Not from the plaintiff, your Honor.

21 MR. JACKSON: No. Thank you, Judge.

22 THE COURT: Okay. Let's bring the jury back in.

23 THE DEPUTY CLERK: Just waiting for one juror that  
24 went downstairs.

25 THE COURT: I guess while we're waiting, counsel, my

GCD9PIC4

Picarella - cross

1 plan is to -- I'll have my staff -- let me find out.

2 Plaintiff's counsel's e-mail situation working, your internet  
3 service up again?

4 MR. HUBBARD: Yes, your Honor.

5 THE COURT: I'll have my staff e-mail counsel the  
6 final draft of our jury instructions and if there are any sort  
7 of typographical errors or if there's anything that we've  
8 discussed here that's not reflected in there counsel should  
9 respond in writing. We'll give counsel until I guess we can do  
10 that by let's say about six o'clock tonight.

11 MR. HUBBARD: Yes, your Honor.

12 MR. BORTNICK: To understand, so it's not to make new  
13 objections, it's just -- because your Honor didn't rule on  
14 certain things presumably by what we see in the document will  
15 be your ruling.

16 THE COURT: Correct. Yes. Correct. Not for new --  
17 not for renewing old objections. If there's something again  
18 dramatically incorrect or there's some typographical error or  
19 if there's something that I've ruled on that I neglected to  
20 reflect in the instructions then let me know about that.

21 Everybody here, Tara?

22 THE DEPUTY CLERK: All the jurors are here.

23 THE COURT: Okay. Let's bring them in.

24 (Continued on next page)

GCD9PIC4

Picarella - cross

1 (Jury present)

2 THE COURT: Please be seated.

3 So both sides have rested. Here's what we're going to  
4 do. We are going to let you go for the day today. We're going  
5 to ask that you come here tomorrow at 9:30 sharp in the  
6 morning. In the morning at 9:30 a.m. we're going to have  
7 closing arguments by both counsel and then I will give you the  
8 instructions on the law and then you can begin your  
9 deliberations. All right.

10 So in the meantime don't discuss the case with anyone  
11 else. Don't let anyone discuss the case with you. Don't do  
12 any independent research related to any of the issues germane  
13 to this case. And have a wonderful evening and I will see you  
14 tomorrow morning at 9:30.

15 (Jury excused)

16 (Continued on next page)

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Picarella - cross

1 (In open court)

2 THE COURT: Any objection to my instructions to the  
3 jury? Did I leave anything out?

4 MR. HUBBARD: No, your Honor.

5 MR. JACKSON: No, Judge.

6 THE COURT: All right. You may be seated. So I will  
7 see you tomorrow. Let's get counsel here at 9 a.m. to avoid  
8 bumping into the jurors and so we can clear up any other sort  
9 of issues on the instructions with the law. Is there anything  
10 else we need to take up today?

11 MR. HUBBARD: Not a thing, Judge. Thank you.

12 MR. JACKSON: No. Thank you very much, your Honor.

13 THE COURT: Okay. Have a good day.

14 (Adjourned to December 14, 2016 at 9 a.m.)  
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## INDEX OF EXAMINATION

Examination of:	Page
SUZANNE WHITE CARR	
Cross By Mr. Hubbard . . . . .	.1145
Redirect By Mr. Jackson . . . . .	.1149
MICHAEL PICARELLA	
Direct By Mr. Bortnick . . . . .	.1150
Cross By Mr. Jackson . . . . .	.1174

## PLAINTIFF EXHIBITS

Exhibit No.	Received
301 and 302 . . . . .	.1150